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NON-NATURAL USER AND RYLANDS *v.* FLETCHER

THE limitation of the rule in *Rylands* v. *Fletcher* [1] to cases of non-natural user of land is attested by several decisions of varying authority, and generally accepted by textbook writers. The latter are, however, unusually coy about the matter. For the most part they neither attempt to define the limitation nor seek to rationalise the cases in which it is applied. The reader is supposed to be satisfied by being told that the exception is "highly flexible" [2] or "inherently vague," [3] or even that it is undesirable to attempt to define it.[4] Worst of all, nothing is done to help those puzzled students of the law who cannot see, in the light of the modern decisions, what was so non-natural or extraordinary in Messrs. Rylands' and Horrocks' [5] conduct in building a comparatively small reservoir on their site in a crowded industrial area of Lancashire where the substratum was riddled with coal mines and the surface cluttered with mills and factories.

This article does not seek to investigate the present-day scope of the non-natural user limitation.[6] It is an historical inquiry into the genesis of the limitation, and in the course of the inquiry it is proposed to demonstrate how looseness in the use of an ambiguous phrase can eventually erect a casual and otiose *obiter dictum* into a hard, albeit vague, rule of law.

It is generally agreed that the only begetter of the conception of

1 (1865–68) 3 H. & C. 774 (Exch.); L.R. 1 Ex. 265 (Exch.Ch.); L.R. 3 H.L. 330 (H.L.).
2 Street, *Torts*, 2nd ed., p. 249.
3 Winfield, *Tort*, 2nd ed., p. 528.
4 Salmond, *Torts*, 12th ed., p. 558.
5 Less than justice has been done to Jehu Horrocks. His co-defendant, John Rylands, and the plaintiff, Thomas Fletcher, have qualified for immortality as long as there is a law of tort, but Jehu Horrocks invariably goes unnoticed. I am happy to pay this tribute to one whose share in the construction of this celebrated reservoir has helped to contribute to legal discussions which would seem to have no end.
6 This was considered some years ago in Stallybrass, "Dangerous Things and the Non-natural User of Land," 3 C.L.J. 376, and Goodhart, "Liability for Things Naturally on the Land," 4 C.L.J. 13.

non-natural user was Lord Cairns in his speech in the House of Lords.[7] Salmond and his editors consider that Lord Cairns' remarks may have been uttered *per incuriam*.[8] Pollock appears to have supposed that Lord Cairns deliberately drew attention to a necessary qualification of the wide rule laid down by Blackburn J. in the Exchequer Chamber, and Winfield [9] and Street [10] concur in the view that Lord Cairns' qualification was intentional.

The word " natural " is never a happy word in a legal context: the law of causation in tort would be easier to understand if the expression " natural and probable " had never been invented, and " natural justice " and " natural rights " are expressions which have clouded many a straightforward case. " Natural user " is an even less trouble free expression, as can be seen from the fact that " ordinary " and " usual " are often taken to be synonymous with " natural " in this context. " Natural " means primarily that which exists in or by nature and is not artificial: but in the secondary sense it can mean that which is ordinary and usual, even though it may be artificial. When we are told that " a modern bride's home will naturally contain a refrigerator," or that " the well dressed man will naturally have the bottom button on his waistcoat undone " no one imagines that the elemental forces of nature are at work.

It will therefore help towards an elucidation of what Lord Cairns intended and what subsequent judges have supposed he intended if we distinguish carefully between the factual situations in which the conception of natural user might ordinarily be involved. And as the leading case arose out of a complaint that the plaintiff's close had been flooded by water we will suppose such a case, where the issue depends on liability for damage done by water which has admittedly come to the plaintiff's close from the defendant's close.

Situation I.—The water fell as rain on the defendant's close and by the mere gravitation has flowed on the plaintiff's close.

Situation II.—The water fell as rain and *accumulated itself* in the defendant's close: by the defendant's act done in the user of his land it flows by gravitation on to the plaintiff's land.

Situation III.—The water was *accumulated by the defendant* on the defendant's close, and this water has subsequently flowed by gravitation on to the plaintiff's land.

In Situation I there is clearly no liability, and with one notable exception no one has ever supposed that there could be liability. *Pontardawe R.D.C.* v. *Moore-Gwyn* [11] and *Neath R.D.C.* v. *Williams* [12] are clear authorities on the point. If the plaintiff's land is at a lower level than the defendant's land he must suffer the gravitational descent of weathered rock, topsoil, water and the like.

[7] L.R. 3 H.L. at 337–340.
[8] Salmond, *Torts*, 12th ed., p. 557; and see 3 C.L.J. at 390–391.
[9] Winfield, *Tort*, 2nd ed., p. 257.
[10] Street, *Torts*, 2nd ed., p. 243.
[11] [1929] 1 Ch. 656.
[12] [1951] 1 K.B. 115.

The notable exception is Goodhart [13] who criticised the *Pontardawe* case on the ground that *Proprietors of Margate Pier and Harbour* v. *Town Council of Margate* [14] had not been cited to the court. But in *Neath R.D.C.* v. *Williams* [15] Goddard L.C.J. drew attention to the fact that in the *Margate* case the nuisance complained of (accumulated seaweed) was the result of the construction of a pier, and it was therefore a case of an accumulation caused by the defendants' act.[16]

It is sufficient confirmation of the fact that there is no liability in Situation I to refer to the hundreds of thousands of acres of low-lying land in Britain which are bogged or barren because they suffer the descent of water or detritus from the adjacent hillsides. It is inconceivable that the law supplies a remedy in such cases.

Situation II is most clearly represented in the case of *Smith* v. *Kenrick*,[17] a case which was extensively discussed in *Rylands* v. *Fletcher*. In *Smith* v. *Kenrick* the defendants' coal mine contained a subterranean lake, being an accumulation of rain-water bounded by a bar of coal. It was obvious that if this bar of coal were worked the water would be released and would gravitate into the plaintiff's mine, but nonetheless the defendants worked the coal. The defendants were held not liable. Giving the judgment of the court Cresswell J. said: " It would seem to be the natural right of each of the owners of two adjoining mines . . . to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue to the owner of the adjoining mine. . . ." As we shall see, the same result was arrived at in the similar case of *Wilson* v. *Waddell*.[18]

Situation III is, of course, the situation of *Rylands* v. *Fletcher* itself.

From the beginning of the *Rylands* v. *Fletcher* litigation it was evident that if the plaintiff were to succeed he must distinguish *Smith* v. *Kenrick*. This led the plaintiff's counsel, Manisty, Q.C., to fasten on the fact that the water in the reservoir was an artificial accumulation, and in all three courts this point was in the forefront of his argument.[19] It was this approach which led counsel for the

13 4 C.L.J. at 27–28.
14 (1869) 20 L.T.(N.S.) 564.
15 [1951] 1 K.B. 115.
16 Strangely enough in *Davey* v. *Harrow Corporation* [1958] 1 Q.B. 60 Lord Goddard, delivering the judgment of the court, referred to the fact that the *Margate* case had not been cited in the *Pontardawe* case but did not repeat the distinction which he had drawn in *Neath R.D.C.* v. *Williams*.
17 (1849) 7 C.B. 515.
18 (1876) 2 App.Cas. 95.
19 " Each adjoining landowner has a right to work up to his boundary, and if by so doing water flows in its natural course and causes damage, there is no remedy; *but if a person artificially collects water on his land*, etc." (3 H. & C. at 781–782): " Similarly the mine-owner who works to the edge of his land subjects himself to the natural flow of water into his mine, but not to the flow of water *artificially brought* there " (L.R. 1 Ex. at 270); " If the water had come into his mine from natural causes alone, he could not have complained; *but it came in through the act of the defendants in making their reservoir. They introduced there water which would not have come there in a natural way.* . . . " (L.R. 3 H.L. at 335).

defendants to go so far as to deny that there was in fact an artificial accumulation.[20] An alternative expression—" foreign water "—is used in the arguments and judgments, but this is a looser expression, for sometimes it refers to water brought from outside the defendant's close and at other times to additional water flowing in to the plaintiff's close over and above what would normally flow.

In the judgment of the Exchequer Chamber delivered by Blackburn J. the word " natural " or " naturally " occurs eight times. On six occasions it is related to the type of consequences for which a defendant would be liable (*e.g.*, " answer for the natural and anticipated consequences," " damage which is the natural consequence of its escape "). On one occasion it is related to the capacity of the dangerous agent to do damage (" something which, though harmless while it remains there, will naturally do mischief if it escape "). But only once does the word occur in relation to the circumstances in which the dangerous agent comes to be there, and that is where Blackburn J. speaks of " the neighbour, who has brought something on his own property which was not naturally there." A purist might object that if a thing is already on the land, naturally or otherwise, it cannot be brought on the land; and certainly the only sensible meaning which can be made of the words as they stand is that Blackburn J. was requiring two conditions to be satisfied before the rule could apply, *viz.*, (1) the mischievous agent which has escaped must have been imported on to the land; (2) before its importation nothing of the same type must have been on the land in the course of nature. In fact we must not read too much—if indeed we read anything—into this rather slipshod phrase which has crept into an otherwise carefully worded judgment. Blackburn J. was merely contrasting the immunity from liability in the case of natural accumulations, such as a rain-water pond, with the *Rylands* v. *Fletcher* liability in the case of artificial accumulations, such as constructed reservoirs.

Now to come to Lord Cairns and his contribution. The passage which is regarded as the origin of the conception of non-natural user of land must be considered in the light of what immediately precedes it. Lord Cairns has explained that the defendants might lawfully have used their close " for any purpose for which it might in the ordinary course of the enjoyment of land be used," and then goes on to say " and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had

20 " The defendants did not themselves bring the water to their land; the water coming to their land naturally, they used it when there for an ordinary purpose " (Mellish, *arguendo*, 3 H. & C. at 786). Presumably the water which went to fill the reservoir came from a stream flowing through the defendant's close. The Ordnance map of the area suggests this much.

taken place." Even if Lord Cairns had not stated as much in the next paragraph [21] we should recognise these words as based on *Smith* v. *Kenrick*, for not only are the facts identical, but he goes on to say that if the plaintiff had desired to guard himself against the intrusion of water it was for him to do so by interposing some barrier between his close and that of the defendant, which was a point strongly made in *Smith* v. *Kenrick*. The three relevant phrases in the passage just quoted—" any purpose for which it might in the ordinary course of the enjoyment of land be used," " if, in what I may term the natural user of that land, there had been any accumulation of water," " if, by the operation of the laws of nature, that accumulation of water had passed off "—all have their counterpart in *Smith* v. *Kenrick*. The using of the land for " any purpose for which it might in the ordinary course of the enjoyment of land be used " was the carrying on of ordinary coal-mining operations; the accumulation of water in " the natural user of that land " was the formation of the subterranean lake of rain-water; and the passing off of the accumulation of water " by the operation of the laws of nature " was the gravitational descent of the water into the plaintiff's mine.

Then comes the vital passage. " On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose, which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any operation in or under the land. . . . " We must pay a tribute to Lord Cairns for making it quite clear what he meant. He contrasts " natural use " and " non-natural use "; he goes on to define " non-natural use " as " introducing into the close that which in its natural condition was not in or upon it," and he relates the definition more precisely to the facts before him by saying " for the purpose of introducing water in quantities and in a manner not the result of any operation in or under the land." Added to which he gives *Baird* v. *Williamson* [22] as an illustration of this latter principle, and that was a case when the defendants incurred liability because they had actively pumped water into their (higher) mine where it would consequentially flow into the plaintiff's (lower) mine. Lord Cairns' non-natural user is therefore merely expression of the fact that the defendant has artificially introduced on to the land a new and dangerous agent.

Since the House of Lords was accepting Blackburn J.'s judgment in the Exchequer Chamber *in toto*, and with commendation, it was unfortunate that Lord Cairns thought that his own paraphrase

21 " As an illustration of that principle, I may refer to a case which was cited in the argument before your lordships, the case of *Smith* v. *Kenrick* in the Court of Common Pleas."

22 (1863) 15 C.B.(N.S.) 376.

would cast additional light. To attempt to improve on Blackburn J.'s carefully worded judgments is never a worthwhile occupation. But probably even more harm was done by the reporter who framed the headnote to the House of Lords report with the opening paragraph: " When the owner of land, without wilfulness or negligence, uses land in the *ordinary* manner of its use, though mischief should thereby be occasioned, he will not be liable in damages." The subsequent paragraphs of the headnote show clearly that this first paragraph refers merely to the *Smith* v. *Kenrick* situation of a natural accumulation being disturbed by the ordinary working of land, but its prominence at the forefront of the headnote has often been taken as proving that the modern defence of justifying the artificial accumulation of a dangerous agent as being " ordinary " and " usual " dates back to *Rylands* v. *Fletcher* itself.

It did not take long for *Rylands* v. *Fletcher* to become a valuable counter for plaintiffs to play in tort actions. It made its first appearance in *Jones* v. *Festiniog Ry. Co.*[23] in 1868, decided while *Rylands* v. *Fletcher* was still under appeal to the House of Lords, and consequently throws no light on our problem. Nor does *Wilson* v. *Newberry* [24] provide any material. The case was decided on demurrer and it is not easy to gather from the short report what exactly were the facts. The defendant had some yew trees on his land. The trees were clipped and clippings, in some way not mentioned in the report, got on the plaintiff's land where his horses were poisoned. The plaintiff had elected to sue in negligence, and the question on the demurrer was whether the declaration raised a duty to take care. The court appeared to take the view that all that had been pleaded in the declaration was consistent with the trees having been clipped by a stranger without the defendant's knowledge and the clippings removed by the stranger and placed on the plaintiff's land.

Next was *Carstairs* v. *Taylor*,[25] and if " natural use " in the sense of ordinary user could have been relied on it was precisely the case where one would have expected defendant's counsel or the court to raise the point. *Carstairs* v. *Taylor* is the first of the many cases brought by an occupant of a lower floor who has received an influx of water from a floor above. In this case the trouble arose from the fact that the defendant's premises were constructed so that the rain-water falling into the gutterings was collected in a wooden box whence it was led safely away by pipes. Unfortunately a rat had gnawed a hole in the wooden box. The action failed, but the case must be regarded as destitute of any *ratio decidendi* since the three members of the court gave entirely different reasons for favouring the defendant. Kelly C.B. thought that this was a case

[23] (1868) L.R. 3 Q.B. 733.
[24] (1871) L.R. 7 Q.B. 31.
[25] (1871) L.R. 6 Ex. 217.

of *vis major*: he equated the rat's actions to the depredations of a burglar or a flash of lightning. Bramwell B. regarded the plaintiff as barred from recovery on the ground that the guttering arrangements were provided as much for the plaintiff as the defendant. And Martin B. said that *Rylands* v. *Fletcher* had no bearing as one who takes a floor in a house must " take the premises as they are." But no one suggested that the guttering arrangements were " natural " or " ordinary " or anything of the sort.

Then we come to *Ross* v. *Fedden*,[26] an important but neglected case. It is neglected because most writers have paid attention only to the report in the *Law Reports* series and ignored collateral reports. It is important because Blackburn J. was in effect cross-examined about the *ratio decidendi* of *Rylands* v. *Fletcher*. The *Law Reports* report contains a very jejune account of the argument but it is given in a much fuller form in the *Law Times* series. It was a case where the plaintiff was tenant of a ground floor of an industrial building and the defendants were tenants of the second floor. A water closet on the defendants' floor had leaked water onto the plaintiff's floor. The plaintiff based his case fairly and squarely on *Rylands* v. *Fletcher* but the county court judge gave judgment for the defendants. He doubted whether the rule laid down for adjacent landowners in *Rylands* v. *Fletcher* could apply to the case of two persons occupying different floors of the same house, but assuming it did apply he held that plaintiff could not recover because the water closet and water system were in existence when the plaintiff came to the premises, and therefore as between plaintiff and defendant the building with its water system represented a natural state of affairs.[27]

On the opening of the appeal in the Queen's Bench all three judges (Blackburn, Lush and Mellor JJ.) intimated that they were satisfied with the county court judge's judgment, and then the parry and thrust of debate began. Lush J. took the point that both parties knew there were water pipes when they took the premises and Mellor J. asserted that the system of water pipes was for the benefit of both parties. In answer to these interjections counsel for the plaintiff rested on the principle of *Rylands* v. *Fletcher*. " Here were two distinct tenements, and the possessor of one was as much bound to keep water collected thereon from invading the other, as if the premises, instead of being superincumbent, had been adjacent as in *Rylands* v. *Fletcher*." At the mention of *Rylands* v. *Fletcher* Blackburn J. entered the fray with the observation: " If Rylands, after letting the waters into his reservoir, had kept it tight for a time, and had then let it to an occupier who suffered them to escape, the case would have been more like the

[26] (1872) L.R. 7 Q.B. 661; 26 L.T. 966; 41 L.J.Q.B. 270.

[27] " As far as [the plaintiff] is concerned, I think the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water."

present one." The innuendo of this interjection is clear: those who take tenancies of land where there is an artificial accumulation of water are not liable, though presumably the lessor who made the accumulation may be. At a later point in the argument Blackburn J. accused counsel for the plaintiff of seeking "to establish a duty in the tenant to maintain the thing in its original condition at his own peril." Then counsel for the plaintiff suggested that the point in issue was a new point "like the question in *Rylands* v. *Fletcher* which had never before been decided until the adjudication of that case." This remark appears to have enraged Blackburn J. who retorted that he must have wasted his time in preparing the judgment in *Rylands* v. *Fletcher* if he had not succeeded in showing that there was no law in that case which had not been law for the previous 300 years. Discussion of the actual case of *Rylands* v. *Fletcher* naturally led to *Tenant* v. *Goldwin* [28] which the plaintiff's counsel assumed to be strongly in his favour since there the plaintiff had succeeded in respect of an overflowing privy. Then there followed this passage:

Plaintiff's counsel—	"*Rylands* v. *Fletcher* was decided upon *Tenant* v. *Goldwin*."
Blackburn J.—	"It was."
Plaintiff's counsel—	"And is as near to (that) case as possible." [29]
Blackburn J.—	"Not so, for there the defendant had collected the filth, and was bound to keep it in. Here the pipe of the water closet had by age or by defective use become defective, and the person liable for the consequences of that was he who was bound to keep it in order."
Mellor J.—	"It formed part of the house which had certain conveniences."
Lush J.—	"The water may have been collected in a cistern or some other part of the premises, perhaps, for aught we know to the contrary."
Blackburn J. -	"Each took his floor from the landlord with a knowledge of the cistern. Then does each occupier do more than contract that he will not do anything to cause mischief?"

The line of reasoning which Blackburn J. indicated in argument is crystallised in the opening passage of his judgment. "The court is invited to say that the defendants, being occupiers of the upper storey of a house in which there is a water closet, with a pipe

[28] (1704) 2 Ld.Raym. 1089.

[29] As this remark of counsel reads it would appear to mean that *Tenant* v. *Goldwin* was as near to *Rylands* v. *Fletcher* as possible. Obviously, as Blackburn J.'s next remark shows, what counsel meant was that *Tenant* v. *Goldwin* was as near the facts of *Ross* v. *Fedden* as possible, and "that" is a misprint for "this."

which had been demised to them with the rest (or rather they had the use of it), there was an obligation on them at all hazards, at their peril, to keep that pipe from giving way." [30] And he goes on to hold quite shortly that there was no such obligation. Though he expressed a general approbation of the judgment of the county court judge he did not refer to the proposition that as between plaintiff and defendant the water closet and water system was a natural state of affairs. Indeed, the words " natural " and " ordinary " appear nowhere in the judgments.

Nichols v. *Marsland* [31] in 1875 throws little light on the problem. At best it is negative evidence. The *ratio* of the case is that *vis major* is a defence to *Rylands* v. *Fletcher* liability and the words " natural " and " ordinary " are absent from the judgments.[32] The dangerous agent in the case was a series of ornamental lakes which had been on the defendant's property for 150 years, and nothing would have been easier, if thought apposite, to argue that such lakes were an ordinary and usual feature of any gentleman's estate. *Wilson* v. *Waddell* [33] in 1876 likewise adds nothing. Mineral works caused a subsidence with the result that rainfall flowed into an adjacent lower coalfield. Lord Blackburn, holding the landowner not liable, said that every owner has the right " to use it in the natural course of user," and in the case of land used for mining, taking away minerals is a natural course of user. He cited Lord Cairns' observations in *Rylands* v. *Fletcher* as covering the case.

Another case in the same year, in which *Rylands* v. *Fletcher* was cited, is the well-known case of *Tarry* v. *Ashton*,[34] where the plaintiff used it in support of the proposition that if a man hangs up a thing which is dangerous if not kept in repair he must keep it in repair at his peril. Though Blackburn J. was on the bench he neither intervened in the argument nor mentioned *Rylands* v. *Fletcher* in his judgment. The significant thing about the case for our purpose is that it never occurred to anyone to suggest that hanging a lamp over a tavern door was a usual and ordinary use of land.

Then in 1878 we come to *Hurdman* v. *North Eastern Ry. Co.*[35] where a slight change of view is discernible. The defendants had raised the surface of their lands with the result that rain falling on their lands soaked through the plaintiff's walls. The defendants, of course, argued that there was here no artificial accumulation of

30 This quotation is from the *Law Times Reports*. There are wide divergencies in the three reports of the judgments in the *Law Reports*, the *Law Times Reports* and the *Law Journal Reports*, and the *Law Times Reports* appears to report most completely what was actually said.

31 L.R. 10 Ex. 255; 2 Ex.D. 1.

32 Though at one place Bramwell B. spoke of non-liability in the case of " a reasonable use of the property in a way beneficial to the community."

33 2 App.Cas. 95.

34 (1876) 1 Q.B.D. 314.

35 (1878) 3 C.P.D. 168.

water: the rain flowed away naturally by gravitation. The plaintiff's answer to this was that by raising the surface of the land the defendants had created an artificial erection. And, needless to say, the mining cases such as *Smith* v. *Kenrick* and *Wilson* v. *Waddell* were invoked. Cotton L.J. giving the judgment of the court distinguished the mining cases in these words: " But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land. . . . That this is the principle of these cases, appears from . . . what is said by the Lord Chancellor in *Fletcher* v. *Rylands*." In the final outcome of the case the defendants were held liable on the ground that their action in raising the surface amounted to an " artificial erection."

Anderson v. *Oppenheimer* [36] was another case of a leaky domestic water supply. In the lower court the case was fought on the grounds of negligence and breach of covenant for quiet enjoyment and *Rylands* v. *Fletcher* was not cited. The case was cited in the Court of Appeal but the defendant was held not liable on the ground that the plaintiff benefited from the accumulation of water. It was never suggested that the domestic water supply was natural, ordinary, usual or anything of that sort.

The first clear equation of Lord Cairns' " natural use " with what is ordinary and usual may be traced to *Farrer* v. *Nelson* [37] in 1885. The plaintiff as tenant of a farm complained that the defendant who had shooting rights over the farm had overstocked the land with pheasants. *Rylands* v. *Fletcher* was not in fact cited, but Pollock B. clearly had it in mind when he said: " As I understand the law each person in this country is entitled to bring on his land any quantity of game which can be reasonably and properly kept on it, and so that nothing extraordinary and non-natural is done." [38]

Now, *Farrer* v. *Nelson* was a very special case. It was not really a *Rylands* v. *Fletcher* case since plaintiff and defendant were not the occupiers of different closes, and this fact, together with the fact that *Rylands* v. *Fletcher* was not cited, would have meant that it would probably never have been heard of again in this connection had it not been for the activities of Mr. Garrett [39] who published *The Law of Nuisance* in 1890. In the chapter in that book which dealt with *Rylands* v. *Fletcher* liability, the author neatly, and

[36] (1880) 5 Q.B.D. 602.

[37] 15 Q.B.D. 258; 52 L.T.(N.S.) 766.

[38] This passage in the *Law Reports* is completely rewritten from the judgment as delivered and reported in the *Law Times Reports* where it reads: "I do not dispute that a landowner in this country is entitled to keep upon his land any amount of game that can be reasonably and properly bred in the ordinary user of things. . . . But the moment this reasonable user is departed from, and becomes what may be termed unnatural or extraordinary, etc. . . . "

[39] E. W. Garrett (1850–96), barrister and later Metropolitan Police magistrate.

reasonably correctly, paraphrased Lord Cairns' dicta into the proposition: " If the owner of land used it for any purpose which from its character may be called non-natural user, such as for example the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril." Unfortunately in the comment on this proposition he incautiously cited *Farrer* v. *Nelson* as an instance of user going beyond natural user.[40]

Three years later when trying *National Telephone Co.* v. *Baker*,[41] a case of escaping electricity, Kekewich J. turned to this book for help. He found it, so he said, " a work of uncommon merit." He read Garrett's rephrasing of Lord Cairns' dictum, and then doubtless his eye strayed on to the next page where he saw *Farrer* v. *Nelson*. The result was that when he came to give judgment he cited Garrett's proposition with approval, but with the added suggestion that it could be improved by the substitution of " extraordinary " for " non-natural."

It would have been ungrateful, to say the least, if Garrett had ignored this hint from one who had given such a public advertisement to the worth of his book, and in the second edition of 1897 the passage in question was rewritten to read: " But if the owner of land uses it for any purpose which from its character may be called non-natural or *extraordinary*, etc. . . ." [42] And the end of this little story is that in 1908 in *West* v. *Bristol Tramways Co.*[43] Alverstone C.J. incorporated Garrett's revised passage in his judgment.

In *Ponting* v. *Noakes*,[44] a case of cattle being poisoned by a yew tree, Collins J. remarked that " a yew tree near a fence is a lawful and usual thing," but this was purely *obiter* for the point was not taken in argument and played no part in the decision which went on the ground that there was no escape. Similarly in *Gill* v. *Edouin* [45] where the plaintiff, who had a right to discharge rain water on to the defendant's flat roof, complained of an overflow due to an obstruction in the gully, the statement of Wright J. that it is an exception to *Rylands* v. *Fletcher* liability when a man " uses his land in the ordinary and reasonable manner of use " was *obiter*, for the judge substantially decided the case on the ground of the plaintiff's consent, and this was the sole ground upon which the Court of Appeal affirmed his judgment.

Blake v. *Woolf* [46] was another case of a leak from a floor above. The plaintiff was a ground-floor tenant of the defendant who occupied the fourth floor where there was a cistern which supplied the entire premises. Wright J. (with whom Darling J. concurred) held

40 Garrett, *Law of Nuisance* (1st ed., 1890), p. 122.
41 [1893] 2 Ch. 186.
42 Garrett, *Law of Nuisance* (2nd ed., 1897), p. 130.
43 [1908] 2 K.B. 14, 20.
44 [1894] 2 Q.B. 281.
45 (1894–95) 71 L.T.(N.S.) 762; 72 L.T.(N.S.) 579.
46 [1898] 2 Q.B. 426.

that the defendant was not liable. He observed that it was an exception to the rule in *Rylands* v. *Fletcher* " where a person is using his land in the ordinary way " and expressed the view that the maintenance of this cistern in the usual way " seems to me to be an ordinary and reasonable user of such premises as these were." But he went on to give a more substantial ground, which is the only ground mentioned in the headnote; namely, that the plaintiff by taking the premises and accepting his water from the defendant's cistern must be taken to have assented to the water being kept on the defendant's premises.

Mention must be made of *Blake* v. *Land & House Property Corporation Ltd.*[47] for the sake of completeness, and not because the report can be treated as of much value. Like many of the cases in the early volumes of the *Times Law Reports* the judgment is in condensed note form. It was yet another case of water from a domestic supply leaking from an upper floor to the plaintiff's premises below. Stephen J. giving judgment referred to *Rylands* v. *Fletcher* and then is reported as saying: " Was it a matter of that sort? Could the water be said to be collected in the same way as in that case? It was not on the same footing. Here it was the ordinary domestic apparatus which is in every home. The facts brought the case near *Ross* v. *Fedder* (*sic*). When they had to do with anything so artificial as a house in London, tenants must take it subject to the ordinary risks." It will be observed that the defendant owed his immunity not to natural user but to " artificial " user!

Finally we come to *Rickards* v. *Lothian*,[48] important both because it was the first time the point had reached an ultimate court of appeal, and because it is this case which is usually regarded as the starting point for the more recent cases. Again it was a case of an overflow from a top floor into the plaintiff's premises on the floor below, the tap of a lavatory basin having been turned on and the waste pipe plugged. The case is not well reported. The precise issues raised by the pleadings are not stated, and according to the statement of facts and argument *as reported* no special point was made about *Rylands* v. *Fletcher* liability, though Lord Moulton [49] states that this was the principal contention in the Supreme Court of Victoria. It looks as if the plaintiff put his case on (i) *Rylands* v. *Fletcher* liability, (ii) negligence, the negligence being failure to provide a proper escape for the water in the event of an overflow. The jury found the defendant negligent, and further found that the flooding was the result of the malicious act of a third person.

[47] (1887) 3 T.L.R. 667.

[48] [1913] A.C. 263. In the Judicial Committee of the Privy Council, on appeal from the High Court of Australia, which by a majority reversed a decision of the Supreme Court of Victoria setting aside a judgment at the trial in favour of the plaintiff.

[49] *Ibid.*, p. 274.

The greater part of Lord Moulton's opinion in the Judicial Committee was directed to establishing that the malicious act of a third person is a defence to *Rylands* v. *Fletcher* liability, and this holding was sufficient to decide the issue. But then he went on to add [50]: "But there is another ground upon which their Lordships are of opinion that the present case does not come within the principle laid down in *Fletcher* v. *Rylands*. It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community." And for this proposition he cited *E. & S. African Telegraph Co.* v. *Cape Town Tramways*,[51] *Blake* v. *Woolf* and *Ross* v. *Fedden*.

We may now gather up the threads. In this historical survey from *Rylands* v. *Fletcher* in 1865 to *Rickards* v. *Lothian* in 1913 we have dealt with fourteen cases. Four of these can be excluded from further consideration: *Blake* v. *Land & House Property Corpn.* because the report is so faulty that it defies analysis: *Wilson* v. *Newberry* because the claim was in negligence alone: *Farrer* v. *Nelson* because it was on an entirely different branch of law: and *Ponting* v. *Noakes* because there was no escape of the dangerous thing.

Of the ten remaining cases the defendant was held liable in two cases and not liable in the remaining eight. Of the two cases where the defendant was liable one is *Tarry* v. *Ashton*, but on what ground he was held liable no one has ever discovered.[52] It was certainly not on non-natural user since the point was not raised. The other is *Hurdman* v. *N.E. Ry.* where the decisive fact was that the defendant had altered the natural condition of the land by creating an "artificial erection."

The eight cases where the defendant escaped liability may be classified as follows:

In four cases (*Carstairs* v. *Taylor*, *Ross* v. *Fedden*, *Anderson* v. *Oppenheimer* and *Nichols* v. *Marsland*) the question of non-natural user was not raised.

In one case (*Wilson* v. *Waddell*) the plaintiff failed because the damage was done by rain water which had flowed to a lower level as a result of mining subsidence caused by the defendant's operations, *i.e.*, it was a *Smith* v. *Kenrick* case.

This leaves three cases where "natural user" was an element in the judgments which led to the defendant escaping liability.

[50] *Ibid.*, 279–280.

[51] [1902] A.C. 381. This case certainly does not support Lord Moulton's views. Lord Robertson referred to "the principle of *Rylands* v. *Fletcher* which subjects to a high liability the owner who uses his property for purposes other than those which are natural," but this carries the matter no further than Lord Cairns had done in 1868.

[52] See (1940) 56 L.Q.R. 2 (Winfield); (1940) 56 L.Q.R. 143 (Landon); and (1943) 59 L.Q.R. 67–68 (Friedmann).

Gill v. *Edouin* was decided on the ground of the plaintiff's consent to the accumulation and what was said about " natural user " constitutes merely supporting dicta. In *Blake* v. *Woolf* " natural user " was a supporting, though secondary, ground of the decision. But in *Rickards* v. *Lothian* Lord Moulton undoubtedly regarded it as a ground of equal weight to the other ground, namely that the escape was brought about by the malicious act of a third person.

More instructive, however, is to consider the matter chronologically and note how the idea arises that it is a defence to a *Rylands* v. *Fletcher* action that the defendant's accumulation of the dangerous agent is natural or ordinary or usual. From the date of *Rylands* v. *Fletcher* itself up to 1885 the idea is unknown, though there are at least five cases during that period in which such a defence might well have been raised, if anyone had thought it worth while, and two in which it certainly would be raised according to present-day practice. In fact up to 1885 " natural user " appears but twice (*Wilson* v. *Waddell* and *Hurdman* v. *N.E. Ry.*) where the expression is used accurately in the sense that Lord Cairns had used it.

It was Pollock B. in *Farrer* v. *Nelson* who moved away from the Lord Cairns' dictum by equating " natural " with that which is " ordinary " or " reasonable " or " proper." From *Farrer* v. *Nelson* up to *Rickards* v. *Lothian* we have five cases and in each of these " natural " is equated to the ordinary and usual.

What led to this change we cannot tell for certain. Shall we blame Pollock B. for having started it, being aided and abetted by Garrett and Kekewich J.? Or shall we blame the reporter who framed the headnote in *Rylands* v. *Fletcher* for having misled Pollock B.? Or shall we blame Lord Cairns who sowed the seeds of trouble by juggling with the word " natural."

Lord Cairns had dealt with three distinct conceptions, and he kept them distinct, but it was his fault to introduce the word " natural " into each. The first is a reference to an escape " by the laws of nature." Here he meant no more than that the dangerous agent moved on to the plaintiff's close in consequence of a natural force, *e.g.*, gravity, and was not propelled thither by the act of the defendant. The second is a reference to " the user of land in the ordinary course of enjoyment " which he equates with " natural user." But his very next words show that he was referring to *a user of land which caused the dangerous agent to escape*, as in the *Smith* v. *Kenrick* type of case. And thirdly he refers to " non-natural use " which is artificially introducing the dangerous agent on to the land.

Shortly, what has happened by the time of *Rickards* v. *Lothian* in 1913 is that " ordinary " which had been used as a synonym for " natural " in Lord Cairns' second conception (*viz.*, the user which caused the dangerous agent to escape) had been transferred to the

third conception which relates to the introduction of the dangerous agent on to the land, so that whereas Lord Cairns asserted that bringing the dangerous agent on to the land was necessarily " non-natural use " we are now led to believe that it is only " non-natural " if it is " not ordinary." And the result as applied in the modern cases is, we believe, one which would have surprised Lord Cairns and astounded Blackburn J.[53]

F. H. Newark.*

[53] It has been suggested that Lord Cairns' " natural use " can be identified with the " ordinary use " of land which Bramwell B. in *Bamford* v. *Turnley* (1860) 3 B. & S. 62, considered to be a defence to a plain action for nuisance. See Stallybrass, 3 C.L.J. at 392–393; and see Goodhart, 4 C.L.J. 24. The difficulty of accepting this is that no such identification was suggested in the case and Blackburn J. could hardly have missed it if relevant.

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THE RIGHT TO THREATEN STRIKES

" The right of workmen to strike," said Lord Wright in 1942, " is an essential element in the principle of collective bargaining." [1] The recent decision of Sachs J. in *Rookes* v. *Barnard* [2] is of critical importance to the law relating to strikes. Indeed, commentators have suggested that, by it, " the whole pattern of industrial relations could conceivably be subtly changed." [3] This judgment deals with the law of tort regulating strikes, and the defences afforded by section 3 of the Trade Disputes Act, 1906—the statute by which the structure of " legislation designed to safeguard the individual's freedom of organisation and freedom of strike was completed." [4] It was passed at a time when many felt that " the tender mercies of the common law were cruel towards trade unions " [5] and when " the attitude of the courts reflected that of the middle class." [6] Any new construction of that Act is bound to touch sensitive nerves; and might even give rise to a demand for rectifying legislation after the fashion of *Bunn's* case [7]; *Taff Vale* [8]; and the *Osborne* judgment.[9]

The core of the tort found by Sachs J. was the *threat* to take strike action in breach of contract. Prospective breaches of contract became a tort actionable by an injured third party. It will be submitted here that this finding is, with respect, questionable in terms of the existing authorities; and that, anyway, the Trade Disputes Act, 1906, provides, in section 3, a good defence for any such tort, where a trade dispute is being pursued.[10] In the course of these submissions some fundamental questions of tort and contract necessarily arise.

1 In *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435 at p. 463.
2 [1961] 2 All E.R. 825; [1961] 3 W.L.R. 438.
3 *The Economist*, May 27, 1961, p. 689.
4 Kahn-Freund, in his illuminating lecture on " Labour Law " in *Law and Opinion in England in the 20th Century*, ed. Ginsberg, (1959) pp. 215–216 (referring to the earlier Combination Laws Repeal Acts, 1824 and 1825, and the Conspiracy and Protection of Property Act, 1875). The lecture brings up to date his chapter on " Legal Framework " in *The System of Industrial Relations in Great Britain*, ed. Flanders and Clegg (1954). (It may be added here that no mention need be made in this article of the Trade Disputes and Trade Unions Act, 1927, which was wholly repealed in 1946.)
5 Lord Chancellor Loreburn, speaking on the Trade Disputes Bill, 1906, *Parl. Deb.* (4th Ser.) Vol. 166, col. 689. See too Section VII *infra*, p. 589.
6 Kahn-Freund, *op. cit.*, p. 241. See too p. 232, where he cites Sir Winston Churchill's famous dictum of 1911: " It is not good for trade unions that they should be brought in contact with the courts, and it is not good for the courts."
7 *R.* v. *Bunn* (1872) 12 Cox C.C. 316. The Act of 1875 followed.
8 *Taff Vale Ry.* v. *A.S.R.S.* [1901] A.C. 426. The Act of 1906 ensued: " the main charter of Trade Unionism ": Webbs' *History of Trade Unionism* (1920) p. 606.
9 *A.S.R.S.* v. *Osborne* [1910] A.C. 87. which resulted in the Act of 1913 which legitimised the political levy.
10 Also, it will be contended that the distinction between a " threat " and a " warning " is still open in future cases. See *infra*, p. 580.

I. ROOKES *v.* BARNARD

Rookes worked as a draughtsman for B.O.A.C. at London Airport, in an office where from 1951 the union [11] had an informal " 100 per cent. membership " agreement with the employers. Under the terms of a more formal agreement of 1949, the employers and unions had undertaken that, if a dispute arose, certain arbitration procedures would be observed, and that, " no lockout or strike shall take place." [12] In 1955 Rookes left the union. The local union members, including the defendants Barnard and Fistal, who were respectively branch chairman and local shop steward, took up the matter. They and Silverthorne, the third defendant, who was a Divisional Organiser (" a paid official of the union " [13]), advocated strike action if Rookes remained. A resolution was passed by members in the office informing B.O.A.C. " that if the non-unionist Mr. D. E. Rookes is not removed . . . a withdrawal of labour of all A.E.S.D. membership will take place." At various times Silverthorne and Fistal let the management know of these developments; and Barnard produced a circular advocating the use of " all weapons " to remove the plaintiff. Sympathetic strike action was planned. In face of this, B.O.A.C. put Rookes on paid leave, and later lawfully dismissed him with notice.

It was agreed by both sides that the terms of the 1949 agreement formed, " so far as applicable part of the contract of employment " of A.E.S.D. members at the London Airport office; that a " trade dispute " existed at all material times; and that all the defendants' acts were done " in furtherance " of that dispute. The jury found that there was a " conspiracy to threaten strike action . . . to secure the withdrawal " of Rookes; that all three defendants were parties; that all three had threatened " to take strike action " to that end; and that, their threats having caused his dismissal, Rookes should be awarded £7,500 damages against them.[14]

The judgment of Sachs J. based upon these findings may be summarised as follows:

(i) The tort of " intimidation " had been committed by each defendant. It consisted here in " threats " to do unlawful acts (*i.e.*, to break contracts of employment by departing

11 Association of Engineering and Shipbuilding Draughtsmen (A.E.S.D.).

12 Clause 4 of the Memorandum of Agreement, April 1, 1949. Clause 13 of the same agreement allows for termination on seven days' notice from either side, which Sachs J. may have thought included notice *during* a dispute: p. 828 and pp. 834–835. The agreement was made between representatives of a number of trade unions and a number of employers. As to its status see *infra*, p. 583. On the procedures of the " National Joint Council," see *Industrial Relations Handbook*, 2nd ed., pp. 80–82.

13 p. 827; *i.e.*, *not* an employee of B.O.A.C.: see *infra*, p. 579. The quoted words do not appear in [1961] 3 W.L.R. p. 440.

14 pp. 830–831. Traditional antagonisms remain against juries, largely because of the previous use of the *special* jury in such cases: see Geldart, " The Present Law of Trade Disputes & Trade Unions " (1914) 2 *Political Quarterly*, 17, p. 44.

from the provisions of the 1949 agreement) which resulted in "reasonably foreseeable damage" [15] to the plaintiff aimed at by these threats.

(ii) Conspiracy to engage in such unlawful intimidation was actionable and not protected by section 1, Trade Disputes Act, 1906.

(iii) Section 3 of the 1906 Act did not afford any defence.

II. Trade Disputes and Conspiracy

The fact that the defendants' acts were done in furtherance of a "trade dispute" [16] is of particular importance in relation to conspiracy. Conspiracy, now generally accepted as a tort,[17] may be committed by a combination resulting in damage to the plaintiff either (a) by *acts unlawful in themselves*, or (b) by acts (which would be lawful in an individual) done with the predominant object of injuring the plaintiff and not for some justifiable or "legitimate" object.[18]

Section 1 of the Act of 1906 specially protects type (b) by providing:

> An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.[19]

Modern developments in the law of conspiracy have rendered this section of diminished importance—first, because pursuit of trade union objectives is now regarded as a "legitimate" object; and secondly, because the meaning of "furthering a trade dispute" has been narrowed so as to exclude many combinations to injure which lack such lawful justification.[20] Because of section 1, only the first

[15] p. 832.

[16] As defined by s. 5 (3), Trade Disputes Act, 1906: see Citrine, *Trade Union Law*, 2nd ed., p. 496 *et seq.*, and Hickling (1961) 24 M.L.R. 375–379. (On "political" disputes see also Hedges and Winterbottom, *Legal History of Trade Unionism*, Chap. VI; Goodhart "The Legality of the General Strike," *Essays in Jurisprudence and the Common Law*, Chap. XI.) As to the nature of the dispute in the present case see [1961] 2 All E.R. p. 830, note 2.

[17] Sometimes without enthusiasm: see Newark (1959) 1 Univ. Malaya L.R. 111. Even Salmond thought it was only a special example of intimidation: *Torts* (6th ed., 1924), pp. 576–578 (see, however, *ibid.*, 12th ed., p. 672).

[18] Street, *Tort*, 2nd ed., p. 354; Clerk and Lindsell, *Torts*, 12th ed., p. 333; Winfield, *Tort*, 6th ed., p. 524.

[19] The section amended s. 3 of the Conspiracy and Protection of Property Act, 1895, which used the same formula to protect conspiracy as a crime, after the courts had outflanked that section by creating liability in tort for conspiracy. Hedges and Winterbottom, *op. cit.*, Chap. V; Citrine, *op. cit.*, Chap. 1. The 1906 section does not apply, therefore, when the 1875 Act does not apply, *e.g.*, to seamen (s. 16).

[20] As to (i) see the *Crofter's* case, *supra*; *Scala Ballroom (Wolverhampton) Ltd.* v. *Ratcliffe* [1958] 1 W.L.R. 1057; as to (ii) *Huntley* v. *Thornton* [1957] 1 W.L.R. 321, pp. 345–346, 349–350.

type—(a)—of conspiracy could be relevant in *Rookes* v. *Barnard*.[21] We return to the conspiracy later.[22] The plaintiff had to prove some act unlawful in itself. That was found in the " threats " which constituted the tort of " intimidation."

III. Intimidation

(a) *General*

There is little agreement among the textbooks about the exact area covered by the tort of " intimidation." [23] The word is not always used as a term of art; and together with " threat " and " coercion," has had a chequered twentieth-century career.[24] Between 1868 [25] and 1906, and especially after *Quinn* v. *Leathem*,[26] various authorities propounded principles which would have extended liability to cover many forms of economic pressure, more particularly pressure by strikers.[27] Until it was condemned as " the leading heresy " [28] the view was common that the crux of liability in *Quinn* v. *Leathem* [29] was not to be found (as it is found today) in the combination, and that the cause of action was " ruining the plaintiff's business by coercing his customers," [30] the " coercion " being threats to call strikes. And in the first *Taff Vale* judgment, liability of the union secretary was based partly upon his " most

21 [1961] 2 All E.R. 825; see p. 833, where Sachs J. distinguished the two types of conspiracy (citing s. 3 instead of s. 1); and where he suggests that in type (b) the *common law* always provides a defence if a trade dispute is being furthered. *Quaere* if there are " two equal concurrent purposes," to further a trade dispute and to injure unjustifiably, p. 835.

22 *Infra*, p. 581, Section IV.

23 Compare Street, *Torts* (2nd ed.), pp. 358–362; Winfield, *Tort* (6th ed.), pp. 729–736; Salmond, *Torts* (12th ed.), pp. 669–671; Clerk and Lindsell, *Torts* (12th ed.), pp. 328–332; Fleming *Torts* (2nd ed.), p. 666; Citrine, *op. cit.*, pp. 49–59; Halsbury, *Laws of England* (2nd ed.), Vol. 32, p. 520.

24 Lord Wright, the *Crofter's* case, *supra*, pp. 466–467 and p. 475; *Hodges* v. *Webb* [1920] 2 Ch. 70, p. 91. *Cf.* Chalmers-Hunt, *Law Relating to Trade Unions* (1902), pp. 11–81. On the allied, but different, problem of " intimidation," and the like, as a crime, *e.g.*, under s. 7 of the 1875 Act, see Hedges and Winterbottom, *op. cit.*, pp. 39, 46, 112, 133; Citrine, *op. cit.*, pp. 424–429. S. 7 adds no new area of civil liability: *Fowler* v. *Kibble* [1922] 1 Ch. 487.

25 When Sir William Erle presented his *Memorandum* to the Royal Commission on Trade Unions, later published as *The Law Relating to Trade Unions*. See especially p. 12 (the right to " freedom in disposing of either labour or capital, or both " is protected), and p. 29 (action lies for violating the right to " freedom of trade," *e.g.*, by malicious obstruction of the " free course for supply of labour ").

26 [1901] A.C. 495.

27 The *Mogul Case* [1892] A.C. 25 established a " lawful justification " for normal trade competition (see the new limits suggested by *Bollinger* v. *Costa Brava Wine Co.* [1960] Ch. 262 to such right of competition). The " closed shop " was held to be a " legitimate " object in *Reynolds* v. *Shipping Fedn.* [1924] 1 Ch. 28, see too *White* v. *Riley* [1921] 1 Ch. 1.

28 Lord Dunedin in *Sorrell* v. *Smith* [1925] A.C. p. 719.

29 [1901] A.C. 495. The defendants had threatened, if the plaintiff did not discharge non-unionists, to call out on strike the men of his chief customer and thereby, as a *punishment*, caused the latter to cease dealing with him.

30 Pollock, *Law of Torts*, 15th ed., p. 245 (Pollock's 1929 text); Kenny, *Cases on Law of Tort*, pp. 194, 528 (1925).

improper " circular, distributed " in order to deter persons from working as and when they pleased. It is a distinct threat." [31]

A different line of cases, however, based upon the majority in *Allen* v. *Flood*,[32] eventually triumphed, and silenced those voices of infallibility whose opinion could no longer be upheld.[33] Conspiracy to injure must be taken to have been the essence of cases like *Quinn* v. *Leathem*; and the tort of " intimidation " is committed only where there was some illegal act done or proposed.[34] Threats can be intimidation. " But it depends on what you threaten." [35] " There is nothing unlawful in giving a warning or intimation that if the party addressed pursues a certain line of conduct, others may act in a manner which he will not like and which will be prejudicial to his interests, so long as nothing unlawful is threatened or done." [36] To be actionable, the threat today must threaten something independently " unlawful." [37]

(b) *Intimidation as a threat (i) to break, (ii) to induce breach of a contract*

(i) Prima facie, therefore, a threat to break a contract might be thought to be tortious.[38] The judgment of Harman J. in *Huntley* v. *Thornton* [39] and the persuasive authority of two first-instance Irish

[31] Farwell J., granting injunctions against Bell and Holmes: *The Times*, August 31, 1900. For subsequent proceedings see [1901] A.C. 426.

[32] [1898] A.C. 1 (Lords Watson, Herschell, Macnaghten, Shand, Davey and James). The *Crofter's* case brought " the posthumous triumph " of these judges: Kahn-Freund, *op. cit.*, p. 243. See the two sets of cases contrasted as at 1930, Hedges and Winterbottom, *op. cit.*, p. 143; and the textbooks cited in note 23, *supra*, for to-day's position.

[33] *e.g.*, Lord Lindley, *Quinn* v. *Leathem*, *supra*, pp. 537–538; and (possibly) Lord Sumner and Viscount Cave L.C., *Sorrell* v. *Smith* [1925] A.C., pp. 713, 741. See, too, on the losing side, *Giblan* v. *Nat. Amalgamated Labourers Union* [1903] 2 K.B. 600 (Romer L.J. p. 619); *Pratt* v. *B.M.A.* [1919] 1 K.B. 244 (McCardie J. pp. 260–261); *Valentine* v. *Hyde* [1919] 2 Ch. 129 (Astbury J.). See Cheshire (1923) 39 L.Q.R. 193.

[34] See especially Lord Wright in the *Crofter's* case, *supra*, pp. 462–467, 472–478, on the earlier case law; also Viscount Simon L.C., pp. 442, 446; Viscount Maugham, pp. 448–453; Lord Porter, pp. 487. And *Hodges* v. *Webb* [1920] 2 Ch. 70, 90–92, *per* Peterson J.; *Davies* v. *Thomas* [1920] 2 Ch. 189.

[35] Holmes J., in his oft-cited judgment in *Vegelahn* v. *Guntner* 167 Mass. 92, p. 107 (1876). Payne in [1954] C.L.P. p. 108 thinks *Temperton* v. *Russell* [1893] 1 Q.B. 715 and *Read* v. *Friendly Soc. of Op. Stonemasons* [1902] 2 K.B. 732 go further; but it is suggested that these cases are only early developments of the tort of inducing a breach of contract.

[36] Lord Wright in the *Crofter's* case, *supra*, p. 467 citing the " admirable " discussion by Peterson J. in *Hodges* v. *Webb* [1920] 2 Ch. 70, pp. 86–95. On the apparent difficulties of *Conway* v. *Wade* [1909] A.C. 506 see *infra*, p. 585.

[37] See too the development of this line of authority in *Ware and De Freville* v. *M.T.A.* [1921] 3 K.B. 40, pp. 84–91 (Atkin L.J.) and pp. 66–71 (Scrutton L.J.); *Davies* v. *Thomas* [1920] 2 Ch. 189; *Sorrell* v. *Smith* [1925] A.C. pp. 718–719, 723–724, 730, 744, 747; *White* v. *Riley* [1921] 1 Ch. 1; *Reynolds* v. *Shipping Fedn.* [1924] 1 Ch. 28; *Thorne* v. *M.T.A.* [1937] A.C. 797; *Thomson* v. *Deakin* [1952] Ch. 646, p. 676.

[38] Citrine, *op. cit.*, p. 477.

[39] *Supra*, at p. 344. To threaten to " withdraw labour in breach of contract " is tortious. He exculpated the two defendants not parties to the conspiracy because they had not so threatened.

cases support this view; and Sachs J. adopted it.[40] Touching on an old chestnut, his Lordship argued that a contract imported a right to performance, not just the option of paying damages[41]; and a threat to break it must therefore be a threat to do a wrong.

But, although such authority as there is may support Sachs J. in this, it is suggested that three considerations might well lead the courts to take a different view. First, it is indeed remarkable that in all the labour law troubles of the last century no such action has ever succeeded. It is true that in many of the cases the court appears to have found, or assumed, that notice to quit either was unnecessary, or, if necessary, would be given[42]; and that, therefore, the threats made related only to what "the men are entitled to do."[43] The illustration, common in the early judgments, of the butler threatening to leave if the cook is not dismissed, obviously assumed that the butler would observe propriety in giving due notice to end his contract.[44] Also, the same cases seem to establish that if there is any obscurity about whether or not the threat talks of a breach of contract, the benefit of any doubt must be given to the threatener—just as general exhortations (*e.g.*, "treat X as black") are not treated as *inducements* of consequential breaches of contract if the object could be obtained by lawful means, *e.g.*, by giving notice.[45] All the same, it must be regarded as very strange that in all the cases where the point could have been critical, there is no English example of a threat to break a contract as a tort for which a plaintiff recovered damages.

Secondly, although "unlawful act" is usually described in the widest terms, there are judicial suggestions as to exceptions, *e.g.*, it may not be actionable to threaten "vexatious" civil actions[46] or possibly breaches of certain statutes.[47] Breach of obligations undertaken only by private treaty between two persons should surely fall into the exceptions where the plaintiff is an outsider.

Lastly, and most important, if this tort exists the doctrine of privity of contract is strangely outflanked. Where A and B have

[40] [1961] 2 All E.R. p. 831, following *Cooper* v. *Millea* [1938] I.R. 749 (Gavan Duffy J. at pp. 758–759) and *Riordan* v. *Butler* [1940] I.R. 347 (p. 353, O'Byrne J.). In neither judgment was the matter argued fully.

[41] See Lord Watson, *Allen* v. *Flood*, *supra*, p. 96; Lord Lindley, *South Wales Miners' Fedn.* v. *Glamorgan Coal Co.* [1905] A.C. 239, p. 253; Kitto J. *A.-G.(N.S.W.)* v. *Perpetual Trustee Ltd.* (1952) 85 C.L.R. 237, p. 297.

[42] *White* v. *Riley* [1921] 1 Ch. 1, pp. 13, 23, 29; *Santen* v. *Busnach* (1913) 29 T.L.R. 214, 215; *Gaskell* v. *Lancs. & Cheshire Miners' Fedn.* (1912) 28 T.L.R. 518, 520; *Ward Lock & Co.* v. *O.P.A.S.* (1906) 22 T.L.R. 327, 330.

[43] *Hodges* v. *Webb*, *supra*, p. 88; and p. 89 on the cook and the butler.

[44] *Allen* v. *Flood*, *supra* (Lord Herschell, 138–139, Lord Shand, 165). The exact threat was never clearly established in that case, but whatever was said the ironworkers could lawfully have stopped work *without* notice under their contracts (see pp. 13, 90, 99, 129–130, 165, 172, 176).

[45] See Jenkins L.J. in *Thomson* v. *Deakin* [1952] Ch., p. 697–698. And see too *Huntley* v. *Thornton*, *supra*, p. 344; and *infra*, p. 580 on the distinction between "threat" and "warning."

[46] Lord Watson, *Allen* v. *Flood*, *supra*, p. 105. See too Lord Dunedin who in *Sorrell* v. *Smith* [1925] A.C. at pp. 723 and 730, equates "unlawful" with "tortious" in this context. [47] See Street, *op. cit.*, p. 360, and cases cited.

a contract which happens to benefit C, even the intentional breach by A who aims to deprive C of that benefit and injures him, does not *ipso facto* give C a right of action against A.[48] But if Sachs J. is followed, a *threat* by A made to B to commit the same breach would, if the same damage ensued, be actionable by C. This has the air of a novel cause of action. If the defendants had *struck* in breach of contract, and done no more [49] presumably they could not have been liable to Rookes, whatever their liabilities to B.O.A.C.[50] But would he have been able to obtain damages (or a *quia timet* injunction) if they had indulged in anticipatory breach by express or implied renunciation? An " announcement of intention " to break the contract, which Sachs J. accepted as the proper description of this intimidation,[51] is equivalent to express renunciation. If an announcement of contingent intention (a " threat ") is actionable, then *a fortiori* a firm unalterable announcement should also be actionable by the third party; and *a fortiori* again, an ordinary breach should also be actionable by the third party!

Anticipatory breach is an odd doctrine as it is. If every such breach is to be actionable at the suit of a damaged third party, the area of liability is enormously widened.[52] In the face of such oddities, the considerations for excluding breach of contract from the category of " unlawful act " begin to weigh heavy. " It is not right to break one's contract, but it is only a breach of duty which the parties have fixed for themselves and it cannot be turned into a tort." [53] Contractual obligations are (in theory) defined by the two parties and are not in the same category as other duties. The tort of " inducing a breach " of contract, established in 1853,[54] is an anomaly not to be enlarged.[55] But at least that tort only permits

[48] *Dunlop* v. *Selfridge* [1915] A.C. 847. *Cf.* Furmston (1960) 23 M.L.R. 373.

[49] That is, not " threatened " at all. *Quaere*: If A threatens to *continue* a breach of contract already committed can C sue even though he could not have sued had A said nothing?

[50] That is, for breach of contract. (The New York Court of Appeals rejected an analogous claim by a third party in *Assoc. Flour Haulers* v. *Hoffman* 26 N.E. 2d 7 (1940).)

[51] p. 832, adopting Clerk and Lindsell, *op. cit.*, 11th ed., p. 324. For the purposes of the alleged tort it does not seem to matter whether the breach would go to the root of the contract or not. Presumably, for example, an announcement of intended action which turned out to be a technical lapse from the agreed disputes-procedures would be enough, according to this judgment, to make for liability.

[52] Presumably the third party can sue even if the other contracting party chooses to *ignore* the anticipatory breach! (On renunciation generally see Devlin J. in *Universal Cargo Carriers Corpn.* v. *Citati* [1957] 2 Q.B. 401, pp. 436–438.)

[53] Pound Ch.J. in *Reiner* v. *N. American Newspaper Alliance* 83 A.L.R. 23, p. 27 (1932).

[54] *Lumley* v. *Gye* (1853) 2 E. & B. 216. In strike cases the measure of damages for the breach of contract would normally be narrower than in any action based on tort: see *National Coal Board* v. *Galley* [1958] 1 W.L.R. 16 (C.A.)

[55] See Collins M.R. in *Read* v. *Friendly Soc. of Op. Stonemasons* [1902] 2 K.B. 732 at p. 739: " The common law did not lightly extend rights arising out of contracts to and against persons not parties thereto, owing to the absence of privity." (His later suggestion that " malice " is the essence of the tort of inducing breaches is not now supportable.)

protection of the contract by a party to it. The tort of " anticipatory threats to break " actionable by third parties would not fit easily into our law.

(ii) Where, however, there is a threat to *induce* breach of contract there is a threat to commit a *tort*. This may indeed be actionable, though to make it actionable at the suit of a third party to the contract is an extension of any known liability.[56] It may be asked whether logic does not demand, here as before, that only a contracting party can be plaintiff in such a case. At any rate, a threat to *induce* breaches was the only possible liability in the case of defendant Silverthorne, since he was not an employee at all. To this we return later. For the moment, we may note that, in a *trade dispute*, inducing a breach of an employment contract is made " not actionable " by section 3, Trade Disputes Act, 1906. So a threat to induce such a breach is here a threat to do an act protected by the statute, not unlawful in itself. Such a threat cannot today be tortious intimidation.[57]

(c) *Other features of intimidation*

Space forbids lengthy discussion of many other points in *Rookes* v. *Barnard* but three deserve brief mention.

First, it was argued that while intimidation required proof of special damage, none had been proved against any defendant individually, because no one threat was itself the *cause* of the dismissal. Sachs J. replied that where all made similar threats, each foreseeing that the others would threaten, they could not be heard to use that argument.[58] Although the reply may be thought to evade section 1 (because the defendants are viewed *collectively* in order to establish *individual* liability), it accords with the attitude taken by our courts elsewhere, *e.g.*, in the nuisance cases.[59]

Secondly, who can sue for intimidation? His Lordship says the plaintiff here could sue because the threats to act in breach of contract were " *likely* to harm the plaintiff and were followed by *reasonably foreseeable* damage." [60] It is suggested with respect that, while foreseeability may now be relevant to remoteness of damage,[61] that is not the test for defining who can sue. A plaintiff

56 Because the plaintiff is a third party relying ultimately upon the contractual obligations.

57 It might be argued that the act remains " unlawful " even though not " actionable." That is not suggested by the cases on s. 1 or s. 3 (*infra*, Section VI). Even if it were so, the modern cases on intimidation do not favour liability, which would be the equivalent of making actionable threats not to perform an unenforceable contract.

58 p. 832. Also each defendant here had *authorised* the others.

59 *Thorpe* v. *Brumfitt* (1873) L.R. 8 Ch. 650, p. 656. But compare Evershed M.R., *Thomson* v. *Deakin* [1952] Ch. p. 688. See Hart and Honoré, *Causation in the Law*, p. 211, for the various views taken by the courts.

60 p. 832 (italics supplied).

61 After *The Wagon Mound* [1961] A.C. 388 (P.C.).

must, it is submitted, have been intentionally *aimed at* by the threat (as Rookes was), just as he must be aimed at by fraud actionable as " intimidation " and not deceit.[62] In that, the tort of intimidation resembles inducing a breach of contract.[63] This makes it much less likely that " customers " or " suppliers " of a threatened employer could sue those threatening to strike.[64]

Thirdly, Sachs J. said that the " argument that to ' inform ' was not to threaten was, quite properly, not pursued." [65] But the earlier cases are replete with the view that " a warning is one thing and a threat is another." [66] It is true that some of these same dicta also enshrined the " leading heresy " about intimidation [67]; but others do not.[68] Although it is true that persuasive advice easily becomes an inducement, the distinction between advice or " exhortation " and inducement to break contracts is firmly upheld in the analogous cases.[69]

Those judgments in which the distinction was not found helpful were those in which the court was still struggling to establish the true test for threats (*viz.*, that they are lawful if the act threatened is lawful [70]). Now that this test is established, the distinction can be relevant only in those cases where the act would be wrongful. Certainly many dicta suggest that an " intimation " or " warning " of possible or likely action or events can still remain lawful, even where a " threat " may not be.[71] To hold otherwise would be to lean against negotiation in just those industrial situations where it is most needed, and perhaps to discourage union officials from giving early warning of impending strikes.

62 *National Phonograph Co.* v. *Edison Bell Co.* [1908] 1 Ch. 335, pp. 360–361; 368–369. Compare Gavan Duffy J. in *Cooper* v. *Millea* [1938] I.R., p. 758.

63 *Stott* v. *Gamble* [1916] 2 K.B. 504; *Thomson* v. *Deakin* [1952] Ch. 646.

64 Such actions are suggested in *The Economist*, May 27, 1961, p. 869. *Sed quaere* whether the plaintiff in *Thomson* v. *Deakin*, *supra*, could now use the judgment of Sachs J. to outflank that decision and sue for intimidation?

65 Addressing the jury: *The Times*, May 5, 1961. The jury was to " assume therefore that that resolution was a threat."

66 Lord Loreburn L.C., *Conway* v. *Wade* [1909] A.C. 506, p. 510. And see Lord James, p. 514: it is a question of fact. It must be noticed that here and in other cases (*e.g.*, *Quinn* v. *Leathem*, *supra; Hodges* v. *Webb*, *supra*) much discussion concerns " threats " made *to the plaintiff* or other workmen (rather than to the employer); but it is suggested that nothing turns on this.

67 See note 28, *supra*; *e.g.*, *Quinn* v. *Leathem*, *supra*, p. 538, *per* Lord Lindley; *Pratt's* case, *supra*, p. 261.

68 *Santen* v. *Busnach* (1913) 29 T.L.R. 214; *Gaskell* v. *Lancs. & Cheshire Miners' Fedn.* (1912) 28 T.L.R. 518; *Allen* v. *Flood*, *supra*. The different distinction in this context between " threat " and " inducement " cannot be upheld: Winfield, p. 733.

69 *Thomson* v. *Deakin* [1952] Ch. p. 686; *South Wales Miners' Fedn.* v. *Glamorgan Coal Co.* [1905] A.C. 239, p. 249; *Camden Nominees Ltd.* v. *Forcey* [1940] Ch. 352; and Citrine, *op. cit.*, p. 467. *Cf.* Grunfeld (1953) 16 M.L.R. 88–90.

70 Notably *Hodges* v. *Webb* [1920] 2 Ch., pp. 87, 91. But see too Lord Herschell in *Allen* v. *Flood*, *supra*, p. 129; and compare Sophian, *Trade Union Law* (1927), p. 241.

71 It is not easy to suggest any exact definition of each term.

IV. The Uses and Abuses of Conspiracy

It is necessary now to pause over the " conspiracy to do an unlawful act." [72] Sachs J. held that the defendants were guilty of a conspiracy to threaten to act in breach of contract. But Silverthorne, as we saw, was not an employee of B.O.A.C. His individual liability, therefore, could not have been for any threat to break a contract, but only to *induce* breaches of contract. No one can threaten to " break " a contract to which he is not a party. But, it may be argued, a conspiracy to break a contract can be made actionable as a combination to do an " unlawful act "; and since the " actions of any one " of the conspirators in furtherance of it are to be " treated as the actions of all of them," [73] Silverthorne was a participant in a combination " to break " or " to threaten to break " contracts.

But this reasoning is not valid. The legal principle is that the " actions " are to be attached to each and every conspirator, not the exact legal character of the actions, so as to make new parties to contracts. It would not be a meaningful use of legal language to speak of Silverthorne agreeing " to break," or to " threaten to break," the contracts which he had not made. What he could do was either to agree to *induce* breaches of other men's contracts, or (as he did) to agree to *threaten to induce* breaches of them. Threatening to induce breaches may be, as we saw, prima facie tortious; and for this, subject to any defence in the 1906 Act, he might be liable. Furthermore, it is suggested that Barnard and Fistal were not really in a different position. Conspiracy cases where breach of contract is the " unlawful means " procured " stand on a special footing " [74] because there can be no " conspiracy to break," or even to " threaten to break," contractual obligations except where the conspirators are also *joint* co-contractors. Where A and B agree together concurrently to break their *separate* contracts with X and Y, it is loose language to say that their conspiracy consists in their having " agreed to break contracts." The courts, in fact, have on occasion been careful not to describe the situation in that way. In such a case (even where both A and B have separate contracts with X only) the tort which they commit is properly described as " the tort of conspiracy . . . constituted by the defendant and his fellow [conspirators] *mutually inducing each other to break their contracts.*" [75] Both A and B aim

[72] " Conspiracy to injure " by lawful acts is not discussed here, in view of s. 1 of the 1906 Act, *supra*, Section II.

[73] Evershed M.R. *Thomson* v. *Deakin* [1952] Ch. p. 674 (but see Street's comment: *Torts*, p. 354, note 1). Sachs J. did not in fact refer to this principle.

[74] Viscount Cave L.C., *Sorrell* v. *Smith* [1925] A.C. p. 713. Other special features include the probability that conspiracies to procure breaches of contracts are not criminal: Glanville Williams, *Criminal Law: The General Part* (1953) § 167; see too *Harrison on Conspiracy*, pp. 29; 96–99.

[75] *National Coal Board* v. *Galley* [1958] 1 W.L.R., p. 28, *per* Pearce L.J. (the judgment of the C.A.; italics supplied). The judgment reads " fellow deputies "; all the deputies had failed to go to work. The action itself rested

to break their own private obligations; but the core of the unlawful combination is the mutual *procurement* of the concurrent breaches to do X damage [76] (*i.e.*, the tort and not the breach of contract).

This distinction, which in many cases would seem unimportant, is in our context critical. It may be tested against the case of C (who has no contract with X) inducing A to agree to break his contract with X, which A does. If such a case is always to be actionable by X as a " conspiracy to break a contract," what has happened to the carefully defined and restricted tort of inducing a breach of contract (which is the liability for which we expect C to be put in peril)? [77] To prevent " conspiracy " from swallowing up all such torts involving two persons, the courts have been careful, in such cases, to talk of " conspiracy to *procure* breaches of contract." [78] Even though A, it is true, is agreeing " to break," his conspiracy with C is a conspiracy " to procure the breach." [79] (It would be no different if C also had a separate contract with X which he agreed to break too.) Apart from joint contractors then, the only way to express such combinations is, it is submitted, *as conspiracies to induce or procure breaches of contracts.*[80] The same points can be made, as it were at one remove, when the breach is

exclusively on breach of contract. Brett J. in *R.* v. *Bunn* (1872) 12 Cox 316, does talk of strikers conspiring simultaneously " to break " their contracts; but that case lacks all authority today, see, *e.g.*, *Gibson* v. *Lawson* [1891] 2 Q.B. 545 at p. 560.

[76] This is surely what Lauterpacht means in " Contracts to break a contract " (1936) 52 L.Q.R. at p. 508: " There is no such thing in law as a conspiracy to break a contract, but if it is unlawful to break a contract it cannot be less unlawful to agree to break a contract." At p. 507 he cites Lord Lindley in *South Wales Miners Federation* v. *Glamorgan Coal Co.* [1905] A.C. at p. 253, whose language is obscure on this point.

[77] *B.M.T.* v. *Salvadori* [1949] Ch. 556, showed that it is no defence to an inducer to show that the inducee was *ab initio* willing; Jenkins L.J., *Thomson* v. *Deakin*, *supra*, p. 694 and see *Larkin* v. *Long* [1915] A.C. 814. (Note that Winfield, 6th ed., p. 724 significantly regards the conspiracy in the *Salvadori* case as existing only among the *inducers*. Contrast Salmond, 12th ed., p. 634.) It may be added that an inducee must in the end be " willing " since he breaks the contract.

[78] Roxburgh J., *ibid.*, p. 569 (italics supplied). Even if this is so, much of the discussion on procuring a breach by " inconsistent dealing " becomes otiose, see Jenkins L.J., *Thomson* v. *Deakin*, *supra*. In *Lumley* v. *Gye* (1853) 22 L.J.Q.B. at p. 471 itself, Crompton J. threw out the idea of treating the tort as " conspiracy " but it is notable that the other judges in 1853 did *not* adopt that idea. (Consider, too, Viscount Simon L.C. in the *Crofter's Case* [1942] A.C. pp. 442–443; see, too, *ibid.*, p. 447, and Lord Wright, p. 462, where " unlawful means " are described as crimes and torts only.)

[79] Glanville Williams, *Joint Torts*, § 35, p. 128, seems to agree with this description by describing the contract-breaker as " implicated in (the inducer's) *tort* as a conspirator " (italics supplied). Consider too *British Industrial Plastics* v. *Ferguson* [1938] 4 All E.R. 504; [1940] 1 All E.R. 479; and *De Jetley Marks* v. *Greenwood* [1936] 1 All E.R. 863, where Porter J., p. 872, suggests that actual breach must precede an action for conspiracy to procure breach: *sed quaere.*

[80] If this is not so, a great deal of the discussion about the proper scope of the tort of inducing a breach has been misplaced; consider Winfield (1943) 59 L.Q.R. 106; Goodhart (1938) 54 L.Q.R. 167; Treitel (1958) 21 M.L.R. 435–436; Payne [1954] C.L.P. 107–108; Carpenter (1927) 41 Harv.L.R. 728; Sayre (1923) 36 Harv.L.R. 688. *Harrison on Conspiracy*, p. 97; *Camden Nominees* v. *Forcey* [1940] Ch. 352.

replaced by a threat to break.[81] It is submitted, therefore, that Silverthorne could certainly not be a party to any conspiracy to threaten to break the employment contracts to which he was not privy; and, further, that even Barnard and Fistal are not correctly described by that formula. All three were really part of a combination to "threaten strike action," *i.e.*, to bring about, mutually procure or induce concurrent breaches of contract on the part of all the A.E.S.D. men at London Airport. The fact that two of them were thereby threatening individually to break their own several contracts is *nihil ad rem* as far as the conspiracy goes. To allow the third-party plaintiff to express this mutual procurement in the loose language of conspiracy "to threaten to break," or "to break," contracts would be to permit him a novel semantic advantage, and seriously affect both section 3 of the 1906 Act (discussed in section VI) and the whole pattern of our industrial law.

V. Breach of Contract and Collective Agreements

Usually collective agreements are regarded by authoritative commentators as being not themselves legally binding contracts.[82] Similarly, the trade union does not normally make them as *agent* for its members,[83] though Sachs J. may at one point suggest this to be the case in *Rookes* v. *Barnard*.[84] But their terms can become part of the individual worker's contract of service, either by express reference,[85] or by implication.[86] In *Rookes* v. *Barnard*, the agreement, as we have seen, forbade strikes during disputes; but it should

[81] Citrine, *op. cit.*, p. 444, apparently does not agree; but he is able to cite only *Riordan* v. *Butler* [1940] I.R. 347 as an example of a conspiracy "to strike in breach of contract." The case was decided on the illegality of a "threat to break a contract": see *supra*, p. 577.

[82] Because "they are intended . . . to be 'binding in honour' only": Kahn-Freund, *The System of Industrial Relations in Great Britain*, p. 57 (discussing the dicta in the cases); and (1942) 6 M.L.R. 115–116. See too, *Ardley and Morley* v. *London Electricity Board* (1956) *The Times*, June 16. Although the "official" view seems to agree (see the Ministry of Labour's *Industrial Relations Handbook* (2nd ed., 1961), p. 19; *Labour Relations and Working Conditions in Britain*, C.O.I., 1958, p. 14), not everybody agrees: see Gayler, *Industrial Law*, pp. 172–174; *The Times* ("Could B.T.C. have sued N.U.R. during a strike?"), February 15, 1960. Sachs J. at pp. 827–828 seems to support the *latter* view about the main agreement in *Rookes* v. *Barnard*. Some agreements may certainly be contractual (*e.g.*, the boot and shoe agreement with a trust deed imposing monetary penalties for certain strikes or lockouts: *Industrial Relations Handbook*, p. 64). Where the agreement is between two trade unions (and an employers' association can be a "trade union" in law)—it is not "directly" enforceable in the courts: Trade Union Act, 1871, s. 4 (4); Citrine, *op. cit.*, pp. 90, 120, 307. The wisdom of making them legally binding is debatable: see Roberts, *Trade Unions in a Free Society*, p. 25.

[83] *Holland* v. *London Soc. of Compositors* (1924) 40 T.L.R. 440.

[84] [1961] 2 All E.R. p. 827: "The representatives of A.E.S.D. . . . were authorised by their executive to bind the trade union as a whole and the members individually. The terms of the 1949 Agreement thus became part of each individual contract of employment. . . ." But what of employees engaged after 1949? And what of non-unionists?

[85] As in *National Coal Board* v. *Galley* [1958] 1 W.L.R. 16.

[86] See *McLea* v. *Essex Lines* (1933) 45 Ll.L.R. 254; *Hulland* v. *Saunders* [1945] K.B. 78. It is suggested that this was the position in *Rookes* v. *Barnard*.

not, on this point, be regarded as wholly exceptional.[87] Previous cases [88] might prompt the question whether it is not an abuse of the implied term to impose this obligation not to stop work directly upon workers who (even if they are union members) may never have heard of it.

But there are many other likely breaches of contract apart from departure from the incorporated provisions of collective bargains—*e.g.*, breach of statutory terms [89]; disobedience [90]; or "go slow" [91]; perhaps even "collective cussedness" [92]; and most usually, quitting work without the notice due under the contract.[93] If Sachs J. is correct a threat to do any of these may be actionable by an injured third party. When we discuss "conspiracies to bring about breaches of contracts" it will be well to remember how commonly such "conspiracies" occur in real life.

VI. Section 3, Trade Disputes Act, 1906

Section 3 provides:

> An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground *only* that it induces some other person to break a contract of employment *or* that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.[94]

The section has two "limbs": limb (1) protecting inducement of breach of employment contracts; and limb (2) protecting "interference" with trade, business or employment, etc. (At the start of its legislative history, only limb (2) was in the Bill. Limb (1) was added by Dilke, to prevent the tort of inducing a breach from destroying the right to organise strikes [95] and the whole clause was regarded by many as "the most important clause of the Bill." [96])

87 For similar prohibitions in other industries, see *Industrial Relations Handbook*, pp. 30–32 (engineering), 39 (building), 42–44 (steel), 50 (rubber), 53–54 (cotton), 69–71 (coal), 75 (gas maintenance), 77 (electricity), 86–87 (railways).

88 Compare *Spring* v. *Nat. Amal. Stevedores and Dockers Soc.* [1956] 1 W.L.R. 585 (where the terms of the "Bridlington Agreement" were rejected as implied terms of union membership, because the member would have said "what's that?"). On this question of implication, see Kahn-Freund (1942) 6 M.L.R., pp. 117–118.

89 See *Cooper* v. *Millea* [1938] I.R. 749.

90 *Sheriff* v. *McMullen* [1952] I.R. 236, p. 257.

91 Always a breach of contract in Kahn-Freund's view: *op. cit.*, p. 106.

92 A suggestive phrase used in *A Giant's Strength* (Inns of Court Conservative Soc.), p. 17.

93 See *Riordan* v. *Butler* [1940] I.R. 347.

94 Italics supplied. On s. 3, see Citrine, *op. cit.*, pp. 466–479, and the cases there cited, which show that the word "only" prevents the section protecting completely separate torts (*e.g.*, defamation or conversion).

95 *Parl. Deb.* (4th Ser.), Vol. 162, col. 1678. For original text of s. 3, see *The Times*, March 31, 1906. It is noteworthy (though not judicially cognisable) that the legislature did not adopt the qualification of "act done by a person" recommended by the Royal Commission: *viz.*, "not in itself an actionable tort." See *Parl. Deb.* (4th Ser.), Vol. 162, col. 1697 *et seq.*

96 Sir Gilbert Parker, *ibid.*, Vol. 164, col. 899.

The section was rejected as a defence in *Rookes* v. *Barnard* on two main grounds—previous judicial opinion, and " first principles " (applied in the light of the law in 1906). Much of the previous judicial discussion of this section has been directed to different questions, *e.g.*, to the suggestion that limb (1) is so specific in saying " contracts of employment " that limb (2) cannot protect against a breach of any contract which is *not* one of employment. The balance of authority appears to favour that view.[97] The two earlier Irish authorities contain no reasoned discussion at all of the section.[98] In *Huntley* v. *Thornton* [99] Harman J. thought that illegal threats were not covered by either limb (because of the word " only "); and he relied, as did Sachs J., upon Lord Loreburn in *Conway* v. *Wade*,[1] who said:

> " Let me see how this alters the pre-existing law. It is clear that, if there be threats or violence this section gives no protection, for then there is some other ground of action besides the ground that ' it induces some other person to break a contract,' and so forth. If the inducement be to break a contract without threat or violence, then this is no longer actionable. . . . If there be no threat or violence, and no breach of contract, and yet there is ' an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills,' then again there is perhaps a change."

This passage has caused judges and textbooks alike to say in general terms that section 3 did not protect " threats " or " coercion." [2]

But that passage must be read in the light of four considerations: (a) It is *obiter*. The *ratio decidendi* of the case concerns the definition of " trade dispute." The issue of the legality of the " threat " was not raised in any lower court.[3] (b) It was pronounced at a time when the " leading heresy " still hung on—*i.e.*, that a

97 Evershed M.R., *Thomson* v. *Deakin* [1952] 1 Ch. 646, pp. 688–689; Upjohn J., *ibid.*, p. 664; Russell J. in *Brimelow* v. *Casson* [1924] 1 Ch. 302, 314 (see the disagreement on this between Gavan Duffy P. and Murnaghan J. in *Sheriff* v. *McMullen* [1952] I.R. 236, 257, 262–263). The puzzlement of Evershed M.R. at the form of the section could be resolved by looking (as he unhappily judicially could not) at its legislative history: *supra*, note 95.

98 *Cooper* v. *Millea*, *supra*; *Riordan* v. *Butler*, *supra*; in both the section is dismissed in a few words.

99 [1957] 1 W.L.R. at p. 347.

1 [1909] A.C. 506, p. 511, *obiter*. Sachs J. adds (p. 834) that Lord Macnaghten and Lord Gorell agreed with the Lord Chancellor's speech. This is true; but each expressed his general concurrence in three lines! Wade had obtained the plaintiff's dismissal (as a punishment for not paying his union fine) by threatening to call a strike, probably *not* in breach of contract. The complaint on non-payment was a " pretence " and " not genuine ": Lord James p. 513.

2 See, *e.g.*, Peterson J. in *Hodges* v. *Webb* [1920] 2 Ch., pp. 85, 87 (where it is to be noted he does not cite the full section); Citrine, *op. cit.*, pp. 476–477. It is accepted, of course, that it does not protect an actual breach of contract.

3 [1909] A.C., p. 508 (counsel); Lord Collins, p. 519; Lord Shaw, p. 520.

threat to do a lawful act might be unlawful.[4] It is not, therefore, at all clear what Lord Loreburn meant by "threat." He surely did *not* mean "threat to induce a breach." (c) Later judges, including Atkin L.J., have thought that a "threat of violence" may have been what was meant in *Conway* v. *Wade*.[5] If that is even a serious possibility, the dictum must lose much of its force. (d) Lord Loreburn did not make it clear which torts, in his view, were covered by limb (2); but it is clear that he thought something probably was.

Sachs J. supplements this authority with an argument based on "first principles":

> "Unless the policy and object of the Act requires otherwise, any construction of a statute that enables a person to defeat or impair the obligation of his contract by his own act or otherwise profit by his own wrong should if possible be rejected."[6]

He joins earlier judges[7] in opining that the uncertain state of the law in 1906 must be taken into account. These two points his lordship adds together to produce the answer that the "policy and object of that Act was . . . to make sure that employees be as a general rule free to pursue by *lawful means* the furtherance of trade disputes."[8]

This decision, it is respectfully submitted, is open to challenge. As is clear from limb (1) (which protects the tort of inducing a breach), the plain purpose of section 3 is to enable persons in a trade dispute to "profit" from what would normally be "wrongs." By restricting limb (2) to "interferences" otherwise *lawful*, his lordship causes it to become declaratory. Thus, half the section, limb (1), effects a big change in the law; but the other half (or more than half) turns out to be declaratory.[9] Such a remarkable conclusion would be justified only if there were very strong indications that that must have been the somewhat peculiar intention of the legislature.

Other judges have taken a contrary view. Lord Macnaghten was clear that the section amended the law by making acts done in

[4] Indeed counsel had relied on *Quinn* v. *Leathem*, *supra*, and *Giblan's Case* [1903] 2 K.B., p. 619. And Lord Loreburn ([1906] A.C., p. 510) says "threats" can be "a good ground of action." See, too, Lord Atkinson, pp. 515–516; and Citrine, *op. cit.*, p. 66, note 99.

[5] *Ware & De Freville* v. *M.T.A.* [1921] 3 K.B., p. 87 (considering Lord James [1909] A.C., p. 514). His views were approved by Lord Buckmaster in *Sorrell* v. *Smith* [1925] A.C., p. 747. Perhaps Street, *Torts*, p. 352, indicates the same view. (But Atkin L.J. was puzzled by the dictum, since in other passages it seems that the threat in *Conway* v. *Wade* was only that the men would cease work "which they lawfully might do." So he fell back on saying that the dictum was "not inconsistent" with the rule that a threat to do a lawful act is not actionable.)

[6] p. 834: citing *Maxwell on Interpretation*, 10th ed., pp. 208–209, who gives as the reason "the general principle of avoiding injustice and absurdity."

[7] *e.g.*, Evershed M.R., *Thomson* v. *Deakin*, *supra*, p. 688. *Cf.* Lord Blackburn, *Young & Co.* v. *Mayor of Leamington* (1883) 8 App.Cas. 517, 526.

[8] p. 834. Italics supplied.

[9] Vester and Gardner, *Trade Union Law and Practice*, p. 135, actually treat the two limbs separately in this way.

" inducing a breach of contract, *or in doing certain other things which would have been actionable* before the Trade Disputes Act, 1906, actionable no longer if done in contemplation or furtherance of a trade dispute." [10] And elsewhere it has been said that the section protects " *three* kinds of offences " in trade disputes.[11]

What then were those " certain other things " actionable before 1906? It is here that the " uncertain state " of the law in 1906 is relevant. It has been judicially noticed that section 3 was enacted in order " to encroach upon the law as laid down in *Quinn* v. *Leathem* and the cases which preceded it." [12] Its aim is to protect strikes against " the terrifying vista of possible unlawful acts, *e.g.*, threats, coercion, molestation, intimidation, conspiracy " opened up by *Quinn* v. *Leathem*.[13] Although the common law is always the same, those who have not given up " the conviction of Galileo " [14] can observe movement in that the liabilities today for intimidation by threats appear to be defined more narrowly than was feared to be the case in 1906, or in Lord Loreburn's day in 1909. This narrower compass, however, is surely no reason for refusing to allow limb (2) to protect that area of liability which remains. Nor is it ground for insisting that it has no application at all, so that it becomes " redundant." [15] That is no way to remedy the " mischief " which the Act sets out to avoid.

One tort, it is suggested, must be protected by limb (2). Since limb (1) protects inducing a breach, limb (2) must include within its privileged " interference " any tort which relies for its legal existence upon a proposed or intended inducement of a breach of an employment contract—*e.g.*, a *threat* to induce such a breach.[16] Such a threat, it was submitted in Section III (b) (ii), is a threat to do an act not in itself unlawful because of section 3 limb (1),[17] and is not, therefore, tortious intimidation. But in 1906 it was not possible accurately to define the forms of " intimidation " which amounted to wrongful interference. If such a threat is actionable after all, and, contrary to our argument, remains tortious here in the face of limb (1), then limb (2) must surely protect it. If that is not so,

10 *Vacher* v. *London Soc. of Compositors* [1913] A.C. 107, p. 119 (italics supplied).
11 *United County Theatres Ltd.* v. *Durrant, The Times*, July 5, 1909, Cozens-Hardy M.R. (italics supplied). Compare Hedges & Winterbottom, *op. cit.*, p. 149.
12 Lord Atkinson in *Vacher's* case, *supra*, at p. 123.
13 Muir, *Trade Unionism and the Trade Union Bill* (1927), pp. 151–152 (Appendix on the law by Jowitt, McNair and Phillips).
14 Lord Radcliffe, *Lister* v. *Romford Ice, etc., Co.* [1957] A.C. 555, pp. 591–592.
15 Both Kahn-Freund, *System of Industrial Relations*, p. 114, and Citrine, *op. cit.*, p. 478, use this description.
16 Gavan Duffy P. was prepared to believe that it " illogically " did not: *Sherriff* v. *McMullen* [1952] I.R., p. 257; but it is hoped that logic would be preferred to the Irish authorities. Consider also Lord Alverstone C.J. in *Scrutton Ltd.* v. *Lewis, The Times*, January 16, 1913: inducing breach of contract, committed " without threat or violence," is not actionable. Plainly the L.C.J. cannot have meant to include threats to induce a breach.
17 Evershed M.R. perhaps equates this with " not wrongful " in *Thomson* v. *Deakin* [1952] Ch. p. 687. See *supra*, p. 579, note 57.

the section shields the actual calling of strikes, but exposes to liability some *threats* to strike, and so encourages lightning strikes called without any negotiation.[18] It is true that section 3 must be strictly construed [19] but even the strictest construction does not allow a court unduly to constrict the natural application of the words.[20] That narrowest meaning for limb (2) is surely reached before it fails to protect threats to induce a breach of contracts of employment.[21] "Interference" must include torts analogous to, or any embryonic forms of, the "interference with contract" [22] protected by limb (1).

If that is the case, then by the operation of section 1, the conspiracy to induce and to threaten to induce such breaches would become "not actionable." On the basis of what has been argued above, the opposite result for all three defendants would be reached, therefore, in *Rookes* v. *Barnard*.[23] It may be added here how critical it would be to allow the plaintiff to express a conspiracy "to induce a breach," or "to threaten to induce a breach" in the form of a conspiracy "to break" or "to threaten to break" the contract. To take the first case, by spiriting away the tort of "inducing a breach" section 3 is completely outflanked, for the section does not protect the breach of contract itself. Thus, section 1 would not protect the conspiracy (though it would still be arguable that section 3, limb (2) did so independently). Indeed, what would be left of limb (1) if an "inducement of a breach" was always actionable as a "conspiracy to break"? By inventing a new semantic form for the tort, the courts could destroy the section. The same arguments, at one remove, apply to limb (2) and to the threat to induce a breach.

It has been argued above that a "threat to break" (as opposed to "induce a breach of") a contract is not tortious against an injured third party. But even if that is incorrect (and Barnard and Fistal had, contrary to the argument in Section III, committed tortious acts in threatening to *break* their several contracts, as Sachs J. held) section 3 is still wide enough to apply. It had long been established before 1906 that threats to strike involved "interferences" with business or employment, which might not be actionable.[24]

[18] The judges usually lean against such a conclusion if they can: *White* v. *Riley* [1921] 1 Ch., p. 23; *Hodges* v. *Webb* [1920] 2 Ch., p. 88.

[19] *Larkin* v. *Long* [1915] A.C. 814, pp. 832–833, Lord Parker.

[20] *e.g.*, "person" in s. 3 cannot be restricted to "party to the dispute": *Conway* v. *Wade* [1908] 2 K.B., p. 849 (C.A.).

[21] It may be noted that we are still within the range of those dicta which suggest that only breaches of contracts *of employment* are covered by the section, since the "interference" relates to threats to induce breach of, and damage caused to, just such contracts.

[22] Note that the tort of "inducing a breach" of contract is sometimes referred to as "interference with contract": see Roxburgh J. in *B.M.T.* v. *Salvadori* [1949] Ch. 556.

[23] [1961] 2 All E.R. 825. Also limb (2) might be thought to protect such a conspiracy independently of s. 1.

[24] *Allen* v. *Flood* [1898] A.C. 1, p. 180, Lord James.

" Interference " which *would* be actionable as intimidation is what limb (2) covers. Indeed, in Ireland, Murnaghan J. was ready to contemplate limb (2) covering acts causing *actual* breaches of many types of contract, since " interference with the business of a person must I think, result in many contracts being broken." [25] One need not go so far in order to protect threats to strike in breach of contract. If the English authorities are correct in suggesting that the whole section relates only to breaches of contracts of employment,[26] then where the " interference " is effected by a threat to disturb the defendant's contract of employment, causing damage to the plaintiff's contract of employment, the protection of " interference " in limb (2) may be said *doubly* to apply.[27] If this is not so, a bizarre situation ensues. Two workers negotiating with their employer had better be careful to threaten only each to *induce* the other to strike, and not each to threaten to quit himself. Indeed, even if, as some assert, the words in limb (2) were inserted only *ex abundanti cautela*,[28] the caution of the legislature must be respected. It would be a strong move to reduce to a redundant nullity half of the " most important section " in the " main charter of Trade Unionism." The court's " only duty is to expound the language of the Act in accordance with the settled rules of construction. It is . . . as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature." [29]

VII. The Policy of the Act and the Courts

Unhappily, the courts will not be able to consider all those aids which would make the policy of section 3 incontrovertibly clear. Limb (2) is, as we have seen, not a mere accretion; it was there before limb (1) and Sir Charles Dilke added the latter by amendment.[30] The whole section 3 was intended to cover all forms of intimidation by interference with contract,[31] and although it attracted less attention than section 4,[32] it bore its share of the

[25] *Sheriff* v. *McMullen* [1952] I.R., p. 262; Gavan Duffy P. disagreed; see, too, Lord Fleming, the *Crofter's Case*, 1940 S.C. 141, p. 163; and *Thomson* v. *Deakin* [1952] Ch. pp. 670, 688.

[26] See *supra*, p. 585, note 97.

[27] The section would still protect even if the damage suffered involved dismissal of the plaintiff in breach of *his* contract of employment: *White* v. *Riley* [1921] 1 Ch. at p. 17, *per* Lord Sterndale M.R., Younger L.J. agreeing, p. 33.

[28] Citrine, *op. cit.*, 478.

[29] Lord Macnaghten, *Vacher's Case* [1913] A.C., p. 119.

[30] *Supra*, p. 584, note 95. A consultant to the unions from 1901, he consistently urged toughness upon weakening Labour members: R. Jenkins, *Sir Charles Dilke*, pp. 394–395; Gwynn & Tuckwell, *Dilke*, Vol. II, pp. 366–367.

[31] See *Parl.Deb.* (4th Ser.), Vol. 162, cols. 1678–1704; Vol. 164, col. 145 *et seq.* Vol. 166, col. 686 *et seq.*; Vol. 167, col. 293 *et seq.* Much of the discussion is about intimidation of *workers* by trade unionists (*e.g.*, coercing them to strike).

[32] Granting trade unions immunity from tort. (It should be added that this whole statute points the need for relaxation of the rule forbidding courts to look at legislative history. *Cf.* Kilgour (1952) 30 Can.B.R. 769, 1087.)

attacks on the Bill by opponents who included Dicey [33] and Lord Lindley.[34] Dicey probably agreed with an interpretation of section 3, similar to that urged in this article.[35] It is true that the Royal Commission of 1903–06 had not in its Report gone so far as did section 3.[36] But the Bill in many respects enlarged upon that Report's proposals; and it was clear that the sponsors of the section intended its words to guard against all possible judicial interventions, of which in the preceding thirty years they felt that they had had enough.[37] In those different days, election posters of 1906 had, after all, depicted a judge handing a scourge to an employer with which to beat a workman.[38]

Since the first decade of the century, English law has developed a policy of abstention in industrial matters. An era of " collective *laissez-faire* " set in,[39] and with it, many thought, a new sociological attitude to labour law on the part of judges.[40] New limitations on the right to organise strikes might now lead to less negotiation and bargaining, and to more " lightning," and apparently motiveless, strikes. For what strike leader is going to negotiate if his " threats " may be illegal when his actual inducement of others to strike is in law protected?

The relations between the common law and trade unions have never been happy. The latter are in law fundamentally still legalised " instruments of revolt." [41] Professor Laski believed that it was " clear that in the history of trade union legislation, principles of the Common Law, previously unknown, were invoked to narrow their purposes in a way which defeated the clear intention of those

[33] *The Times*, 1906, carries his six letters and two speeches protesting against the " privileges " of the Bill between October 29 and December 10. (On October 31, " he asked them [Women's Liberal Unionists] to think what it would mean if the terms on which women—domestic servants for instance—laboured were really regulated by the caprice or even the serious doctrine of a trade union.")

[34] While still a Law Lord, he actually wrote an article in *The Times*, September 6, 1906, attacking the Bill. But the parliamentary opposition did not, when the test came, oppose the passing of the Bill.

[35] See his article, *National Review*, October 1906, p. 209, where he said that s. 3 was " so vague that it certainly may give immunity from an action for wrongs even more serious than inducing the breach of contract ": p. 212n.

[36] See *Parl.Deb.* (*4th Ser.*), Vol. 162, col. 1698; Geldart, *op. cit.*, p. 25. The section met some stiff opponents (*e.g.*, " an absolute disgrace to the Statute Book," Lord Balfour, *Parl.Deb.* (4th Ser.), Vol. 166, col. 728; and Sir Fred. Banbury, *ibid.*, Vol. 164, col. 147–149.

[37] Campbell-Bannerman certainly feared the courts' intervention: McDonald, *The State and the Trade Unions*, p. 60; *Parl.Deb.* (*4th Ser.*), Vol. 155, col. 52–53, See, too, Keir Hardie's reply to Lord Lindley in *The Times*, September 7, 1906, alleging a " compound of bad law, of bad logic, of bias and prejudice, and of political partisanship "; it was " doubly imperative " to see that " no possible loophole " was left.

[38] Trevelyan, *British History in the Nineteenth Century and After*, p. 438.

[39] Kahn-Freund, *Law and Opinion in England in 20th Century*, p. 224 *et seq.*; see, too, *supra*, p. 572, note 6.

[40] For a transatlantic comment, see Cardozo, *Nature of the Judicial Process*, pp. 96–97. English judges can be said to have been ahead of their American brethren in seeing the unions' need for, *e.g.*, the " closed shop."

[41] Robson (1930) 1 *Political Quarterly* 86, 102.

statutes."[42] No commentator on labour law can avoid views (spoken or unspoken) about policy; but it had recently been thought that the "use of the common law to repress strikes is a closed chapter and it is almost inconceivable that any court would now reopen it."[43] na R v B 1964 HL.

VIII. Conclusions

The argument of this article may be summarised as follows:

(a) The existence of the tort of a "threat to break a contract" (actionable by an injured third party) is open to serious question, in view especially of its effect upon privity of contract. (A threat to *induce* a breach may perhaps be a tort so actionable.)

(b) A conspiracy by several contractors to procure breaches of their separate contracts is a conspiracy to commit the tort of "mutually inducing breaches" of (and not "to break") contracts. So too where threats are made, the conspiracy is one to threaten to procure simultaneous breaches.

(c) Where the acts are done in furtherance of a trade dispute, inducing a breach of a contract of employment is protected by section 3, limb (1), Trade Disputes Act, 1906. A threat so to induce is not, therefore, tortious intimidation because the act threatened is not unlawful. Alternatively, a threat to induce such a breach (and, if (a) above is incorrect, a "threat to break") is protected by section 3, limb (2), Trade Disputes Act, 1906.

(d) A conspiracy to commit any of the acts described in (c) is, therefore, protected by section 1, Trade Disputes Act, 1906.

K. W. Wedderburn.*

[42] Note to the *Report of Committee on Minister's Powers*, 1932 (Cmd. 4060), p. 135, citing *Taff Vale* [1901] A.C. 426 and *Quinn* v. *Leathem* [1901] A.C. 495.

[43] Glanville Williams, *Criminal Law: The General Part*, § 167.

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CARELESSNESS, INDIFFERENCE AND RECKLESSNESS [1]

THE law commonly distinguishes " negligence " as the name of an independent tort from " negligence " as referring to the manner in which a man may behave. Although the existence of such an independent tort is possibly due to the seductiveness of the Objective Theory of negligence considered below and although it gives rise to the logical absurdity that a man who deliberately causes harm may be guilty of negligence,[2] technical definitions may perhaps plead exemption from the rules of ordinary use. When, however, jurisprudents suggest analyses of " negligence " (and of " carelessness " and " recklessness ") outside this independent tort, they are open to objection from considerations of logic and use.

(a) CARELESSNESS AND INDIFFERENCE

Salmond [3] subsumed negligence, that is culpable carelessness, under *mens rea* because he defined the careless man as " he who does not care," while Pollock [4] argued that carelessness is a " type of conduct," *e.g.*, " a failure to take precautions against harm." More recently, Glanville Williams [5] has tried to reconcile these views by suggesting that there are two senses of " negligence." The conceptual facts, however, are otherwise.

A " careless " man is one who does not take care; a man who does not care is called " indifferent." Indifference is an attitude which one may take or show to something; but a failure to take care includes a failure to pay attention to certain risks and insurances against them to which we ought to attend. Often the failure of attention of " carelessness " may be due to, and is evidence of, the not caring of " indifference "; but the two are not equivalent.

An attitude may, perhaps, be described as a " state of mind " and, thus, as a form of *mens rea*. A man who is indifferent need not be doing or failing to do anything, mental or physical. The kind of explanation that indifference provides for an agent's action or lack of action is in terms of a temporary mood or of his general character. An attitude, such as indifference, can be " felt," but it cannot be " used " or " exercised." To attribute carelessness, on the other hand, is not to impute an attitude or state of mind. A

[1] I am indebted to my legal colleagues at Hull and to Prof. H. L. A. Hart of Oxford for criticisms of an earlier draft.

[2] Charlesworth, *Negligence*, 1956, pp. 8–9.

[3] *Torts*, 12th ed., §§ 119 *et seq.*

[4] *Torts*, 14th ed., Chap. 11.

[5] *Salmond on Jurisprudence*, 11th ed., §§ 142 *et seq.*; *cf.* Dias and Hughes, *Jurisprudence*, 1st ed., p. 213.

man who is careless or negligent is failing to do something; " care," in this sense, is something which may be used or exercised. Negligent, unlike indifferent, is not something we can be said to " feel." The kind of explanation that lack of care provides for an action or lack of action is in terms of a previous omission, not in terms of a state of mind.

Since negligence is a form of carelessness, Salmond is quite mistaken in supposing it to be a state of mind such as indifference, and Williams is mistaken in suggesting that " indifference " is one sense of " negligence." Remarks made by Salmond, Williams and judges quoted in the literature show that *a* cause of this confusion of " indifference " and " lack of care " is one, rather old-fashioned, use of " careless " in which it does mean " indifferent " and not, as normally, " failing to take care." This use is exemplified in such phrases as " careless of the world's opinion," " careless (as to) whether the consequences occur or not."

" Carelessness " cannot, however, be restricted—as Pollock suggests and Williams allows—to a " failure to take precautions against harm "; it must include also a failure to *attend* to the likely risks involved in an action and to the appropriate precautions against them. Failure to take precautions, as when one leaves unlabelled bottles of poison around or drives a car at night without lights, may indicate lack of care, but it may equally indicate deliberate intent. Nor is an action entitled to be called " careful " if the precautions are taken automatically, or from habit, or without thinking. On the other hand, attention to the likely risks does not seem sufficient by itself to indicate care, if there is, through laziness or deliberately, no attempt to take the obvious precautions. Nor yet do we blame as " careless " an action, however unthinking, in which no precaution has been omitted.

" Carelessness," and consequently " negligence," refer, therefore, neither to a " state of mind " such as indifference nor to a " type of conduct " such as failure to take precautions against harm. Salmond and Pollock plumped for one or other of these mistaken alternatives; Williams wrongly allows both. " Carelessness " is failure to give attention to, and take precautions against, the risks inherent in the successful prosecution of some activity.

An oft-quoted article by H. W. Edgerton,[6] supporting Pollock by an Objective Theory of negligence as " conduct likely to cause harm," shows clearly that a common reason for omitting the notion of " inattention " from that of " carelessness " is the mistaken belief that to admit it leads back to the subjectivism of Salmond. Thus Edgerton and many of the sources he quotes lump together " inattention," " indifference," and even " lack of anxious thought," as synonymous versions of a state of mind theory of negligence. But while lack of anxiety (" free from care ") and

6 " Negligence, Inadvertence, and Indifference " (1926) 39 Harv.L.R. 849 *et seq.*

indifference (" not caring ") may be described as states of mind, attention and inattention (" taking and not taking care ") may not. To pay attention to something is to look at it, listen to it, think about it, etc.; and these are activities, not states of mind or attitudes.

(b) Recklessness

Recklessness is a form of indifference; but whereas indifference is an attitude which may be shown towards anything, recklessness is indifference to the realised possible risks and consequences of one's actions. One can be indifferent to but not reckless about the world's opinion or the suffering of animals, whereas recklessness is a frame of mind in which we behave or are likely to behave. A man in such a frame of mind, one who feels like " damning the consequences," will doubtless be negligent or careless in his actions, but recklessness is the cause of his negligence and not a form of it. We can " feel " reckless but not negligent; we can be in a reckless but not in a negligent " mood "; we can act in a " spirit " of recklessness but not of negligence. Sometimes we are " perfectly " or " absolutely " reckless, but " downright " careless.

Recklessness, therefore, is correctly subsumed under *mens rea*, but incorrectly said to be a form of negligence. The reason for this latter mistake [7] is the same as for the mistake previously discussed of calling indifference, or not caring, a form of negligence. Thus in the standard cases quoted [8] for the reckless utterance of statements, the judgments generally fail to distinguish between an interpretation of " reckless " as not caring whether what is said be true or false and not taking care to discover whether it is true or false; a failure which is concealed by the ambiguity of " careless " in the much-used phrase " careless whether it be true or false." But although a man who does not care whether a statement is true or false will not, in general, take care to find out whether it is true or false—so that carelessness is a good pointer to indifference—these are, as Caldecote C.J. insisted,[9] different accusations. I think that Donovan J.[10] was in error in saying that " The ordinary meaning of the word ' reckless ' in the English language is ' careless,' ' heedless,' ' inattentive to duty.' "

A further confusion about " recklessness " is exhibited by

[7] Williams consistently makes this mistake in *Salmond on Jurisprudence* and sometimes, inconsistently with his main thesis, in *Criminal Law*, 1953, *e.g.*, § 20 " that kind of negligence where there is foresight of consequences."

[8] *e.g.*, *Derry* v. *Peek* (1889) 14 App.Cas. 337; *Bates* [1952] 2 All E.R. 842; *Mackinnon* [1958] 3 All E.R. 657; *cf. Andrews* [1937] A.C. 576.

[9] *Williams Brothers Direct Supply Stores Ltd.* v. *Cloote* (1944) 60 T.L.R. 270.

[10] *Bates* [1952] 2 All E.R. 842. Paull J., in a recent explicit dissent (*R.* v. *Grunwald and Ors.* [1960] 3 All E.R. 380) from the judgment of Donovan J., held that " carelessness may not in itself be sufficient to constitute recklessness, although, of course, it is one of the factors which have to be taken into account." He followed the O.E.D. definition of " recklessness " as " characterised . . . by heedless rashness."

Williams [11] when he argues that the root idea in it is that of " foreseeing the probability of the consequences." This view compels him, in the first place, wrongly to dismiss as irrelevant the remarks which judges sometimes make in cases of alleged recklessness that the defendant " did not care whether he caused damage or not." Secondly, it compels him to bring in an appeal to extenuating circumstances such as " social utility " to account for the fact that we do not, for example, consider as reckless a surgeon who operates though he foresees the probability of death, or railway officers who allow trains to run at 80 m.p.h. But the reason why the surgeon and the railway officers are not behaving recklessly is not that they are performing acts of " social utility," but that they are innocent of the charge that they do not in the least care whether regrettable results, whose possibility they foresee, may ensue from their actions. The reason why we often assume that someone is reckless when he does an action the probable evil results of which he foresees but does not aim at may be that there are, in general, only two obvious explanations for such an action. Either he does not care whether the results follow or not—in which case he is " reckless "—or, although he does care and is, therefore, not reckless, he has to run this risk as the lesser of two evils. Unless the latter explanation is plausible, as it is with the surgeon and the railway officers, we assume the former. Similarly, we normally describe as " reckless " those actions which are typical of reckless persons; but such an action in any given case is not reckless if not done in a reckless frame of mind, just as a given action, though of the typically jealous kind, need not be an act of jealousy. Though doing an action whose probable evil consequences are foreseen *may* be *due to* recklessness, it is not itself to behave recklessly. To behave recklessly is to act not caring whether these consequences ensue or not.

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[11] *Criminal Law*, § 19; *cf.* Dias and Hughes, p. 210.

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TRADE DISPUTES ACT—STRICT INTERPRETATION IN IRELAND

Some recent Irish decisions suggest that the Trade Disputes Act, 1906,[1] may have left the common law in the industrial field just sufficient rope by which to hang itself finally.[2]

Two Cases

In *Smith* v. *Beirne* [3] it was held [4] that a barman employed by a members' club is employed in semi-domestic service and not in trade or industry, and that therefore he is neither (1) a " workman " nor (2) a " person " within section 5 [5] of the Act, and a dispute concerning his non-employment is not a trade dispute.

Given the canons of interpretation, part (1) of the decision is unassailable. However, to qualify " person " in the definition by limiting trade disputes to disputes connected with the conditions of employment, etc., of persons employed in trade or industry is to give to " person " a meaning identical to that given to " workmen " by the same section. This is contrary to a prima facie rule of interpretation,[6] and is supported on two grounds only—First, the word " workman " was not used in place of " person " because it would have been natural to interpret it, in accordance with ordinary usage, as referring only to persons employed in manual labour.[7] This explanation can hardly be sustained in view of the express extension of " workman " by the same section to mean " all persons employed in trade or industry." Secondly, having regard to the nature of the Act, the alternative interpretation would give rise to

[1] 6 Edw. 7, c. 47.

[2] It is difficult to describe more elegantly the process begun by the application of the crime of conspiracy to the activities of combinations and almost completed by the *Taff Vale* case and the 1906 Act which it produced.

[3] (1955) 89 I.L.T.R. 24. A decision commended by Delany, " Immunity in Tort and the Trade Disputes Act—a New Limitation " (1955) 18 M.L.R. 338.

[4] Kingsmill Moore J., O'Daly J. to the contrary. The report is not clear as to whether Maguire C.J. (with whom Lavery J. concurred) decided against the defendants on this ground. In *Branigan's* case (below) Dixon J. did not treat the Supreme Court decision as binding on the point.

[5] " In this Act . . . the expression ' trade dispute ' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment, or with the conditions of labour of any person, and the expression ' workmen ' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . . "

[6] " Where in the same statute and in relation to the same subject-matter different words are used, prima facie the alteration has been made intentionally." Halsbury, *Laws of England*, 2nd ed., Vol. 31, p. 482.

[7] *Smith* v. *Beirne*, *per* Kingsmill Moore J. at 35. The learned judge may have been explaining the use of the word in the definition originally introduced into the Bill, for which see below.

absurdity, in that to give " person " a wider meaning would permit workmen to create a trade dispute on behalf of domestic workers.[8] This may be contrasted with other strange results which have been held not sufficient to justify disregard of the words of a statute.[9] And there is evidence that the common law sense of the absurd is here unduly sensitive, as it has been generally in this field in the past.[10]

If the interpretation being criticised is correct, a workman's union and its members act at their peril in a dispute connected with the employment of any member who may eventually be held to be technically not in trade or industry. The contrast between " workman " and " person " in the section, if given effect to, produces a result which is not anomalous as a compromise between this extreme [11] and conferring on domestic workers full rights to organise without the intervention of a workman party.[12]

However, strict interpretation of the Act was carried further in *British and Irish Steampacket Co. Ltd.* v. *Branigan and Others.*[13] The Marine Port and General Workers Union was opposing the employment by the Carlingford Lough Commissioners of a man to whose qualifications his fellow employees, members of the union, objected. The defendant union officials, because the plaintiff's ship had become " black " by entering Carlingford Lough, induced the crew to break their contracts of service. It was held that there were only two disputes in existence, neither of which was a trade dispute. The original dispute, between the Commissioners and their employees, was not a trade dispute because Dixon J. deduced from a consideration of the activities of the Commissioners that none of their employees were " workmen."

[8] *Smith* v. *Beirne*, *per* Maguire C.J. and *per* Kingsmill Moore J. at pp. 33 and 35.

[9] *e.g.*, *Magor and St. Mellons R.D.C.* v. *Newport Corp.* [1951] 2 All E.R. 839.

[10] Parl. Deb. (4th series), Vol. 167, col. 306, quoted in full below.

The argument is that domestic or semi-domestic service is essentially personal, and not adapted to regulations designed to secure uniformity of conditions, such as trade unions aim at enforcing (*per* Kingsmill Moore J.). But trade unions basically attempt to secure minimum not uniform conditions; there would appear to be no greater difficulty in regulating the conditions of domestic, or certainly semi-domestic, servants than is met, for example, by the Musicians' Union or the National Union of Commercial Travellers. And is the service of a private secretary employed in domestic service, an example given by Kingsmill Moore J., more personal than that of a private secretary employed in industry?

[11] Producing this sort of result: " At that stage of the matter, I feel that there was no doubt . . . in the mind of any member of the executive committee that a trade dispute existed and that the protective cover of the Trade Disputes Act would extend to cover any breach of contract ": *Branigan's* case (below), *per* Dixon J. at p. 131.

[12] For workmen are likely to act in relation to " persons " only if they are employed in work closely related to trade or industry—as in *Smith* v. *Beirne*; many of the examples relied on in the case, amongst others of workmen espousing the cause of a domestic chaplain, are of doubtful significance. And on any interpretation a union which is merely intermeddling is not protected: *Smith* v. *Beirne*, *per* O'Daly J. at p. 38; *Beetham* v. *Trinidad Cement Ltd.* [1960] 2 W.L.R. 79.

[13] [1958] I.R. 128; Delany (1956) 19 M.L.R. 310.

Clearly an employer is *pro tanto* in trade or industry if any of his employees carries on trading or industrial activities for him. But to determine the status of an employee by focusing attention on the activities of his employer may be misleading because it leads easily (as in this case) to the false conclusion that it is the predominant nature of the activities of the employer which is to be considered, so that those activities which are of a minor character in relation to his activities as a whole may be ignored. On the contrary, in determining the status, as workmen or not, of any of his employees mainly engaged in them these minor activities are the only activities of the employer which are material; it is only minor activities of the particular employee which may be discounted.[14]

The Workman Party

More important, Dixon J. held [15] as to the dispute between the Union and the Commissioners that a union whose membership does not consist wholly of workmen [16] cannot provide the necessary workman party to a trade dispute. The arguments are:

1. The Act in places refers to "trade unions," but a dispute between an employer and a trade union is not expressly included in the list of possible trade disputes. Therefore, it is argued, the Act does not intend such a dispute to be classed as a trade dispute indirectly by being considered to be between the employer and the workman members of the union.

This argument would be convincing if the Act contrasted the terms "workmen" and "trade union," but it does not do so.[17] A less strained interpretation is that the former and wider term is used

[14] The major activity of the Commissioners in making and keeping the navigation of the Lough easier and safer was held not to be trade or industry; but see *Re Incorporated Council of Law Reporting for England and Wales* (1888) 22 Q.B.D. 279; *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 184, 185, *per* Lord Wright, and *Bird* v. *O'Neill* [1960] A.C. 907. It appears unlikely in this particular case that any employee was mainly employed in the minor trading activity disregarded.

Smith v. *Beirne*, relied on by the learned judge, is not against the conclusion put forward in the text: transactions between the club members were held to be not so much sales as a method of cross-accounting (*per* Kingsmill Moore J. at 34) so that the activities of the employers were not at all in the sphere of trade although the physical labours of their employees were identical to those of barmen employed in trade. Sales to non-members were disregarded for reasons other than that they were a minor activity of the club.

[15] Following his decision in *Quigley* v. *Beirne & Ors.* [1955] I.R. 62 and in *Smith* v. *Beirne*. In the latter case O'Daly J. in the Supreme Court expressed a contrary conclusion at p. 38. And see note 22, below.

[16] It is not certain from the judgment of Dixon J. that the proposition is limited in this way, but Delany states and approves it in this form ((1955) 18 M.L.R. at p. 341).

[17] The references to a trade union in s. 4 (1) and (2) are for the purpose of providing that a union is not to be treated as a distinct entity in the field of tort. The section also refers to "An action . . . against any members or officials thereof on behalf of themselves and all other members of the trade union." Trade unions rather than workmen are referred to in s. 2 very possibly because it is unnecessary and undesirable to permit an individual workman to appoint a representative to picket for him. The Act also provides that "the expression 'trade union' has the same meaning as in the Trade

in the definition so as to include all workmen, whether or not acting through a union.

2. The Act requires the dispute to arise between employers and workmen in their capacity of individual workmen, so that it is not sufficient that the latter are concerned in the dispute only as union members or as belonging to a particular class of workers. As to this:

(a) The actual definition is clearly divided into two parts—the necessary parties to and the necessary subject-matter of a trade dispute. The necessary subject-matter is stated to be only that the dispute is connected with the conditions of employment, etc., of *any* person. A requirement that the workmen parties are concerned in the dispute as individual workmen appears to amount to requiring a connection between the dispute and the conditions of employment, etc., of a *party* to the dispute, which is totally inconsistent with this format.[18] And the purposes of the definition of " workmen " are clear on its face; it neither requires nor supports this very subtle distinction, largely based on it by the learned judge.[19]

(b) It is particularly difficult to see that an employee can be involved in a dispute with an employer who is not his employer (a class of dispute expressly included in the definition of trade dispute) other than as a class of worker or as a trade union member.[20]

The argument may be that there must be some special likelihood of the employer of the workman party following the example of the employer involved in the dispute,[21] so that it particularly concerns

Unions Acts, 1871 and 1876 " (s. 5 (2)). And the furthest the point has been put on the 1871 Act is that a union is " an entity . . . which by statute has *in certain respects* an existence apart from its members ": *Bonsor* v. *Musicians' Union* [1956] A.C. 104, 131, *per* Lord Porter. A distinction between a trade union and its members is particularly unreal in this present context—the expulsion of a member is a matter particularly affecting a union as a whole; a trade dispute is a matter which particularly affects individual members, who may be required to strike in furtherance of it.

And the list of necessary parties to a trade dispute in s. 5 is clearly taken from the definition of trade union in the 1871 and 1876 Acts.

18 Nevertheless it appears that Dixon J. held this: that the definition means only that although workmen must be involved in the dispute, the dispute may (also) concern a person who is not a workman. " Also " although not in the judgment seems to be implied; see Delany (1955) 18 M.L.R. at p. 340. But the report is far from clear; the extract of the judgment quoted immediately below suggests that a more subtle point is being made.

19 " The distinction was suggested by the definition itself which required the workmen to be ' employed in trade or industry,' that is actual employment was contemplated rather than status as belonging to a particular class of workers or as belonging to a trade union. The idea that a trade dispute was contemplated as something arising between employers and employees . . . was borne out by the remainder of the definition, *viz.*, ' whether or not in the employment of the employer with whom a trade dispute arises.' Here again, the concern seems to be with actual employment ": report of the judgment of Dixon J. at 31.

20 It is assumed in *Dallimore* v. *Williams*, 29 T.L.R. 67, to follow from the extension of the definition to cover this class of dispute that a union may provide the workman party.

21 As in *Dunne Ltd.* v. *Fitzpatrick & Ors.* [1958] I.R. 29, where a resolution signed by workers in shops similar to and in the same city as the plaintiffs' was forwarded by the union to the plaintiffs' employees. The resolution complained that the working of other than the recognised hours by the plaintiffs'

the workman party as an individual. But if the point 2 (a) is correct this must fall short of requiring a connection between the dispute and the conditions of employment, etc., of the workman party. This is altogether too fine and too vague a requirement to be imported into a statute which does not expressly impose it.[22]

Of course there is no trade dispute if union officials are acting on behalf of non-workmen members only. The facts as set out by Dixon J.[23] show clearly that that was not the position in *Branigan's* case. And in deciding whether or not union officials are acting for the general body of workmen members due regard must be had to the wider purposes and principles of combination.

Parliamentary History

The Bill as originally introduced did not define a trade dispute. In response to demands for some limitation to prevent the Act applying to arrangements between traders or to the case of an employer seeking to influence the political activities of his workers,[24] the Attorney-General introduced the original definition [25]—" in this Act . . . the expression ' trade dispute ' means any dispute which is connected with the employment or with the conditions of labour of any person."

The requirement of particular parties to the dispute clearly does not represent a fundamental change of attitude as to the scope of the Act. The amendment was made by the House of Lords,[26] oddly

employees was detrimental to the interests of the workmen signatories, and called on the union to take the steps necessary to protect their interests. Budd J. held that a trade dispute existed. But there can be little doubt that in *Branigan's* case there were some members of the union whose position was similarly closely related to that of the Commissioners' employees—having regard to the fact that the dispute concerned the employment of a person rather than terms or conditions of employment. It cannot be relevant that in *Dunne's* case the workmen personally intervened in the dispute, as opposed to leaving it to their representatives to act in pursuance of general authority.

22 As to the authorities cited: dicta of Lord Parker in *Larkin* v. *Long* [1915] A.C. 814, 833, and of Murnaghan J. in *Sheriff* v. *McMullen & Ors.* [1952] I.R. 236, 262, to the effect that not every dispute with a trade union is a trade dispute, appear to be making other points—the latter that such a dispute may not be connected with the employment, etc., of any person, the former that a dispute between employers is not protected. It is impossible to accept the argument of Dixon J. that *Dallimore* v. *Williams* is not an authority for the proposition that there can be a trade dispute solely between an employer and a trade union. *R.* v. *National Arbitration Tribunal, ex p. Keable Press Ltd.* [1943] 2 All E.R. 633, is concerned with the definition of trade dispute in the Conditions of Employment and National Arbitration Order, 1940, which is restricted to disputes between employers and their own employees. The reference to *Fowler* v. *Kibble* [1922] 1 Ch.D. 140, 487, is similarly most unconvincing. As to the later authorities see the decisions of the Judicial Committee of the Privy Council in *Beetham* v. *Trinidad Cement Ltd.* [1960] 1 All E.R. 274, 279 and *Bird* v. *O'Neill* [1960] A.C. 907, 924.

23 At p. 132.

24 Parl.Deb. (4th series), Vol. 162, in particular cols. 139, 142, 155.

25 Vol. 164, col. 232.

26 Vol. 167, cols. 812, 813—after the word " dispute " to insert the words " between employers and workmen, and servants or persons employed in any trade or industry whether in such employers' employment or not."

enough to prevent any application of the Act to Irish landlord and tenant disputes,[27] and was accepted by the Commons apparently solely to meet fears on this point.[28]

Delany quotes [29] the Attorney-General's statement, apropos the original definition, that " person " should be wide enough to cover every person employed " in any trade, business or industry " as indicating an intended limit to the scope of the Act. But there is no indication in the speech that this was intended to be an exhaustive list; at this stage it was solely the requirement of a connection with employment, etc., in the definition which was to limit the Act, and the possibility of a wider interpretation of " person " was particularly obvious as the definition then stood. The point is put beyond doubt by the Lord Chancellor, referring to the definition as introduced [30]: " the difficulty is, that if you do not use the word ' person ' where can you draw the line? I do not see why domestic servants should not be allowed to strike under the law as anyone else. I do not think they are likely to do it or that we need stand in any apprehension of it . . . our view is not that this Bill should be restricted to workmen in cotton mills, for example, or in collieries. We think that if a strike is legitimate with one set of people a strike is legitimate with others, provided it complies with the law." And it is attributing extraordinary incompetence to the draftsman to suggest that on the rephrasing of the Lords' amendment referred to above, which took place before it was put before the Commons, " person " was retained without qualification otherwise than deliberately.[31]

The net object of this part of the Act was obviously to suppress the decisions in *Lumley* v. *Gye* [32] and *Quinn* v. *Leathem* [33] cleanly as far as they could affect the performance of trade union functions.[34] Advocates of strict interpretation [35] are perhaps unwise to draw attention to Hansard.

27 Vol. 167, cols. 306–320 (Lords) and see Vol. 164, cols. 857–859 (Commons).
28 Vol. 167, cols. 1145, 1146.
29 (1955) 18 M.L.R. at p. 342.
30 Vol. 167, col. 306.
31 Earl Russell had drawn attention to the point by moving an amendment (which was defeated) to the original definition substituting " workmen " or " body of workmen " for " person," Vol. 167, col. 305.
32 (1853) 2 E. & B. 216.
33 [1901] A.C. 493.
34 " Sir John Walton (Attorney-General) said that it was pretty clear and perfectly understood that the term ' trade disputes ' related mainly if not solely to disputes arising from the exercise by trade unions of their various functions " and " the object of the clause (s. 1) was to make it free to trade unionists to decide on the policy which they should pursue. They were the best judges of that," Vol. 162, cols. 142 and 161. The extension of protection to disputes between workmen and employers other than their own employers was intended to provide for the situation in *Quinn* v. *Leathem*, where a union was the only possible workman party—Vol. 167, col. 114.
35 A euphemism for a " tendency common in construing an Act which changes the law, that is, to minimise or neutralise its operation by introducing notions (in this case that union activity by workers is improper) taken from or inspired by the old law which the words of the Act were intended to abrogate and did abrogate." *Rose* v. *Ford* [1937] A.C. 826, 846, *per* Lord Wright.

Roundabout Ltd. *v.* Beirne

Finally there is *Roundabout Ltd.* v. *Beirne and Others*.[36] M.P. Ltd. were, after considerable effort, persuaded by the defendants' union to pay union wages and provide union conditions for their employees. Shortly after this M.P. Ltd. discontinued business and dismissed their employees, now union members. Because they strongly suspected the motives from which this was done the defendants picketed the closed premises. Eight days after the closure M.P. Ltd. granted a yearly tenancy to the plaintiff company, which had been incorporated some few weeks before. The plaintiff company conducted on the premises a business similar to that formerly carried on by M.P. Ltd., and under the same name. The permanent directors and shareholders of the plaintiff company were the directors and shareholders of M.P. Ltd. with the addition of four directors and shareholders who were in both capacities subject to almost complete control by the permanent directors.

Held that the plaintiff company was a legal entity distinct from M.P. Ltd. and therefore the trade dispute with M.P. Ltd. did not attach to it.[37]

Dixon J. held that there was considerable substance for the view that the formation of the plaintiff company was a subterfuge designed to bring about this result; nevertheless it was a legal and therefore valid subterfuge. The, admittedly exceptional, cases in which the courts have dared to lift the veil of incorporation for one reason or another [38] were not cited. *Gilford Motor Co. Ltd.* v. *Horne*,[39] illustrates the realistic appraisal to which Roundabout Ltd. might have been subjected:

> H, a company director, had entered into a covenant not to compete with his former employer. A private company with an issued capital of 202 £1 shares, of which 101 were issued to an employee of the company and 101 to the wife of H, infringed the covenant in fact. The registered office of this company was H's private address and the business was carried on entirely by H, his son and the employee shareholder. An injunction was granted to restrain the company, which was characterised as a " device, a stratagem," " a mere channel " in order to mask the effective carrying on of the business by H.

[36] [1959] I.R. 423.

[37] As to this decision generally see Hudson (1961) 24 M.L.R. 278. But Dixon J. went further than is there stated, holding (at p. 429) that because the plaintiff company had no employees to be peacefully persuaded it was not lawful to picket it " sympathetically " on foot of the original dispute with M.P. Ltd., assuming that that dispute could be said to be still in existence. It is suggested that this quite far-reaching restriction is not supported by the wide wording of s. 2 (1) of the 1906 Act.

[38] See Gower, *Modern Company Law*, 2nd ed., pp. 194–209.

[39] [1953] Ch. 935 (C.A.).

Conclusion

These cases must in many minds prompt an old question: in adjudicating on a matter of sweep and importance in a legalistic way, precisely what functions are the courts fulfilling? [40]

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[40] That is not to say that there are not some real functions left to the courts in this field, and a great deal which should be subject to control by an independent tribunal.

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CRIMINAL LAW REFORM IN NORTHERN NIGERIA

RETROGRADE LEGISLATION IN NORTHERN NIGERIA?

A NEW Penal Code law and a new Criminal Procedure Code law have very recently been enacted in Northern Nigeria. Their significance and detail appear to have escaped notice and it may be doubted whether some of the provisions of these laws are compatible with the Human Rights Legislation in the Federation of Nigeria.

The Penal Code contains what is now the substantive criminal law of that country; the Criminal Procedure Code contains the method whereby the Penal Code is to be enforced and, in relation to criminal process, fixes the rights and liabilities of the subject. The importance of these two pieces of legislation to the Northern Nigerian subject is therefore substantial.

Until the introduction of these Codes, the legal system of Northern Nigeria was dual. There existed, with virtually concurrent jurisdiction, native courts presided over by Alkalai administering Moslem law of the Maliki school and a number of magistrates' courts with professional stipendiary magistrates, usually members of the bar, having a civil and a criminal jurisdiction. There was, of course, a High Court with a jurisdiction corresponding broadly to that of the High Court of Justice, the Court of Criminal Appeal and the Court of Appeal in England. It was possible to appeal from the Moslem courts to the Appellate Division of the High Court. The magistrates' jurisdiction, in the case of Chief Magistrates, empowered them to impose sentences of up to five years' imprisonment in criminal matters and to try civil issues where the subject-matter of the claim was up to £500. Magistrates Grade I had a lesser jurisdiction.

In addition, there were a number of mixed native courts of very limited jurisdiction which administered local native custom and dealt with minor criminal offences.

The magistrates' courts derived their jurisdiction from the Nigerian Criminal and Nigerian Criminal Procedure Codes. These consisted, in the main, of codified English criminal law and procedure and were common to all parts of Nigeria. The criminal law and procedure of both the Western and Eastern regions of Nigeria and of Lagos are derived today solely from this legislation and administered by both African and English magistrates and judges, all of whom are professionals in the sense that they are members of the bar.

The native courts in Northern Nigeria were (and indeed still are) very much local instruments of the particular Emir within whose emirate they sat and it would have been obvious to any intelligent observer that they were dominated by the Emir and his entourage and were really an executive arm of a more or less repressive nature. They were tolerated and, indeed, supported by the British administration precisely because it was recognised that they were an arm of government by the Emirs and it was through the Emirs that the Administration ruled. Provincial Residents and District Officers had wide powers of veto and revision and by these means and particularly by the influence of the Residents, major injustices were avoided and local government moderated.

The " British " magistrates' courts came to be set up when the country began to develop and the system of native courts was unable to cope with the legal business of a modern state. Administrative officers, who also had a first instance jurisdiction, for various reasons were unable to deal with complicated legal issues where parties were more and more frequently represented by counsel.

Once the professional magistrates and judges were installed, administering what was really a democratic system of law, a very large amount of business came their way, especially in areas on the perimeter of the old Moslem conquest. The Tribunals were impartial, they did not hesitate to give decisions which might be administratively inconvenient and they delivered reasoned judgments, on the facts, in public, after painstakingly fair trials. The High Court in its appellate jurisdiction, was no respecter of persons and if an emirate court had erred or acted *ultra vires* it said so and put the matter right. Over a period of time, the " British " courts became a social force in Northern Nigeria and the contrast between them and the courts of the Alkalai became more and more marked. They were able to cope adequately with the business before them, though it was clear that the more magistrates that were appointed the more work they would attract.

Fields of legal conflict between the two legal systems arose—in particular over the absence of any legal doctrine of manslaughter in the Maliki school and the fact that provocation was not recognised as a defence in a charge of murder in Maliki criminal jurisprudence, at any rate in Northern Nigeria.

The quality, also, of many an Alkali was not of the highest. Some were manifestly uneducated in their own legal system, let alone in any modern jurisprudence. There was a widespread belief that some could be " approached." Their dependence on the Emirs was obvious. As had happened in other Moslem countries, the ancient Moslem legal system was proving inadequate to deal with the legal and commercial business of a modernising society.

It was clear that something would have to be done. It is also a

reasonable guess that unless something were done considerable criticism would have to be faced from the other Regions at the London Constitutional Conference which preceded self-government.

Accordingly, in 1958, a panel of jurists was set up and it was recommended by this panel that new Penal and Criminal Procedure Codes based on the existing Sudan Codes should be introduced, with additions to fit Northern Nigeria. This recommendation was acted upon by the Northern Region Government not only in regard to the native courts, but applied *in toto* to the magistrates' courts. This was done notwithstanding that the Sudan was a country much less developed than Nigeria as a whole and in spite of the fact that Nigeria as a whole had enjoyed fifty years of the British legal system, which system would continue in the two other Regions and in Lagos; in spite of the fact that a corpus of criminal case-law had been built up over the years which would now be wasted in the Northern Region and in spite of the fact that the Nigerian police, a Federal force, would now have to master two systems of criminal law and procedure.

Additions to the Sudan Codes which had been made in very recent years were included in the new Northern Nigerian Codes.

The new legislation in Northern Nigeria was presented as a reform of the old system of native courts; in reality it puts into the hands of native courts and, thus, of the Emirs, powers greater than they had exercised during the last fifty years and furnishes a most efficient instrument of repression. By this legislation, it is submitted, the magistrate becomes an official of the Executive and his detachment is destroyed. By these means his status is reduced. As a counter to possible tyranny and as a social force he has been eliminated.

In the Sudan, British rule was succeeded by that of a military junta which came to office by way of a coup. Whether something similar will occur in Northern Nigeria or whether the proximity of the two other Regions, living under a democratic system of law, will engender a different result remains to be seen, but meanwhile, the civil rights of the Northern Nigerian subject have, it is submitted, been much curtailed.

Parts of both the new Northern Nigerian Codes are considered hereunder.

The Criminal Procedure Code Law

Section 117 (1)—" When information is given to the officer in charge of a police station concerning the commission of an offence . . . he shall cause it to be reduced to writing in the prescribed form called the First Information Report. . . ."

(2) " When *on any other grounds* the officer in charge of a police station has reason to *suspect* the commission of an offence referred to in subsection (1) he shall enter the grounds of his *suspicion* on a First Information Report. . . ."

Section 118 (1)—" The police officer shall act as follows . . . : he shall send to the appropriate court the First Information Report."

Section 120 (1)—" After receiving the First Information Report the court may (a) direct that the police shall proceed with the investigation, or (b) proceed to hold an inquiry into or otherwise deal with the case, as provided in Chapter XV (initiate trial by itself)."

(2) " In the event of the court electing to proceed in accordance with paragraph (*b*) of subsection (1) it shall forthwith inform the officer in charge of the police station of its intention so to do and *thereupon the police shall act according to the direction of the court.*"

The effect of the sections is (a) to put before the magistrate who will try an accused person (or hold the committal proceedings) the information and the suspicion (which may be hearsay at second or third hand) in the possession of the police and (b) to put the court of trial into the position of directing the police investigation. The preservation of a judicial detachment may be difficult in these circumstances.

The Code continues:

Section 123 (1)—" A police officer making an investigation under section 118 may require the attendance before him of any person being within the limits of his own police district whose evidence *appears likely to be of assistance* in the case and may examine such person orally."

Such person " (2) shall be bound to attend and to answer the questions put to him except that he shall be warned that he is not bound to answer if his answer would tend to expose him to a criminal charge or to a penalty other than a charge of failing to give information under Chapter XI."

The Penal Code Law, section 136, is as follows:

" Whoever being required by summons, notice, order or proclamation proceeding from any public servant legally competent as such public servant to issue the same to attend . . . at a certain time and place, intentionally and without reasonable cause refuses or omits to attend at the place and time or departs from that place before the time at which it is lawful for him to depart, shall be punished with imprisonment which may extend up to one month or with a fine which may extend up to £10 or with both."

By section 10 of the Penal Code, a public servant denotes (*inter alia*) every person appointed by government or local authority for the performance of public duties and any person in the service of government or a local authority in judicial, quasi-judicial, executive, administrative or clerical capacity and any person in the service of a public corporation established by ordinance or law. There is no doubt that under Nigerian law a police constable of

either the Federal or a local native authority police force is a public servant.

Section 143 of the Penal Code states:

" Whoever refuses to sign any statement made by him when required by a public servant legally competent to require that he shall sign that statement shall be punished with imprisonment which may extend to three months or with a fine which may extend to £10 or with both."

The effect of the foregoing is to place in the hands of the police power very much greater than that now in the hands of the police in this country, with all their reputation for integrity and fairness. The wisdom of placing such power in the hands of police forces in Northern Nigeria, including the local Native Authority Police who are open to local political pressures and of putting the public so completely at their mercy, may be questionable.

To return to the Criminal Procedure Code:

Section 144.—" When a person the subject of a complaint appears before a court under the provisions of section 143 " (not the foregoing section which is from the Penal Code, but a section of the Criminal Procedure Code which, in fact, covers almost all of the usual run of criminal court appearances) " the court may require the police officer in charge of the investigation . . . to state a summary of the case and . . . to produce the *Case Diary* for its inspection and on the application of any such police officer or of its own motion the court may give such directions as to the matters to be proved, how they are to be proved and what documents or other exhibits are to be produced as the court may think fit."

Section 148 is in similar terms:

" If a court taking cognisance of an offence under section 143 thinks that a further investigation should be conducted under the provisions of Chapter XII, the court *shall order* that such further investigation be made . . . and at the time when such order is made or at any stage of the investigation, the police officer or any police officer acting on his behalf may appear before the court and apply for directions as to the matters to be proved, how they are to be proved and what documents, if any, are to be produced."

The effect of the foregoing is to reinforce the magistrates' direction of the police investigation and makes it possible, indeed almost obligatory, where there is insufficient evidence before the court when an accused appears on complaint, for the court to send the matter back for further investigation, to direct that investigation, to continue to do so at progressive stages and, as will be seen, finally to try the suspected offender. Again, the judicial equilibrium may perhaps be difficult to keep in these circumstances.

Sections 155 onwards deal with the method of trial. There is insufficient space to set them out in detail here but, summarised, their effect is that when an accused denies the offence he has

(sections 157 and 158) to show cause why he should not be convicted. The whole of the evidence for the prosecution is heard in chief and at the end of the prosecution's case the accused is asked if he wishes to cross-examine any of the witnesses. If he does, they are then recalled and the accused may cross-examine. The result of such a procedure, apart from delaying justice, is to put a substantial difficulty in the way of the defence, especially if the accused be an uneducated man, for he must remember the evidence of witnesses who may have testified days ago. The witness, too, is enabled to prepare for his cross-examination by the accused.

Section 168 deals with Preliminary Inquiry and Committal proceedings.

Subsection (2) places upon the magistrate the duty of ascertaining from the complainant the names of persons likely to be acquainted with the facts and selecting from them the witnesses to be called.

Subsection (9) is reproduced verbatim:

" Where the accused has not reserved his defence . . . the magistrate may at this stage [close of Prosecution's case] examine him generally for the purpose of enabling him to explain any circumstances in the evidence and to discover his line of defence but nothing in this examination shall be in the nature of a general cross-examination for the purpose of establishing the guilt of the accused."

Section 190 (the trial before the High Court after committal). " After the witnesses for the prosecution have been heard, the examination of the accused duly recorded by or before the committing magistrate shall be produced and read out in court."

Section 235 (1)—" For the purpose of enabling the accused *to explain any circumstances* appearing in the evidence against him, the court may *at any stage* of any inquiry or trial, without previously warning the accused, put such questions to him as it considers necessary and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been cross-examined *and before he is called on for his defence.*"

(2) " The accused shall not render himself liable to punishment by refusing to answer such questions (or by giving false answers) but the court may draw such inference from such refusal as it thinks fit."

(The effect of this particular section is that where the prosecution's evidence falls short of establishing a prima facie case but discloses something suspicious, the court may question the accused generally, even if, for instance, he wishes to rest upon a submission and if he refuses to be questioned, the basis is provided for the inference to be drawn that the suspicion generated is converted into a prima facie case.)

The general effect of all the foregoing sections is to put an accused person, guilty or innocent, at a great disadvantage. The court which has been directing the pre-trial police investigation is, in most cases, to try him and it is clear from section 168 onwards that the magistrate will, in the course of the trial or preliminary inquiry, be leading for the prosecution. It appears that the " golden thread " of British criminal justice, that it is for the prosecution to prove its case and not for the accused to prove his innocence, has been completely broken.

Section 381 demonstrates the sort of thing that is evidently envisaged as a likely possibility under this Code:

(1) " No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed [! !] unless in the opinion of an appeal court a failure of justice has in fact been occasioned thereby."

Counsel in this country learned in the law and, indeed, the general public, might well think that when a man had been tried, found guilty and sentenced (in a native court, possibly to death) without ever having had the charge against him framed or put, that a failure of justice would *ipso facto* occur. It is submitted that this section will put upon an appellant the onus of proving his innocence in relation to a charge never made to the appellate court before any relief can be obtained.

The appeal court which finds a failure of justice has occurred is not to quash the conviction or discharge the accused, for subsection (2) of section 381, dealing with the procedure to be followed if a failure of justice has occurred, provides for a charge to be framed (after the appeal) and the original trial recommenced.

Section 382 provides that no verdict or sentence shall be reversed or altered on account of any error, omission or irregularity in the complaint, summons, warrant, charge, order, judgment *or other proceeding*, unless a failure of justice should have occurred. It is suggested that an appellant against whom a defective summons has been served bringing him to court to trial on a charge which is never framed or put to him, after which a number of irregularities occur and against whom the magistrate finally gives a judgment which omits to take cognisance of a technical aspect of the law, is without redress in the appellate court unless he can demonstrate his innocence (" a failure of justice ") of a charge which has never been made.

In the light of the foregoing the procedure laid down in the same Code for trials in native courts (which have the power of passing sentence of death in Northern Nigeria) is not entirely surprising.

It starts well:

Section 390. " No legal practitioner shall be permitted to appear to act for or to assist any party before a native court."

Section 386 (1)—" In any matter of a criminal nature, a native court shall be guided in regard to practice and procedure by the provisions of this Code."

(3) " The fact that a native court has not been guided by the provisions of this Criminal Procedure Code shall not entitle any person to be acquitted or any order of the court to be set aside."

Section 389. " Upon charging an accused person a native court shall call upon him to state his defence and to inform the court of the names and whereabouts of any witnesses . . . " etc.

Section 391 (3) severely curtails the right of an accused (unassisted by counsel) to cross-examine prosecution witnesses, for the questions are to be put by the court; thus:

" After hearing the evidence of any witness a native court shall ask an accused person if there is any question he wishes the *court to put on his behalf* but shall not be bound to put to a witness any question which does not bear directly on facts which are material to the proper appreciation of the case."

Section 393. An accused person found guilty of homicide by this procedure, is dependent to a substantial extent on the views of the deceased's relations as to whether he shall live or die. Thus section 393:

" A native court having jurisdiction over capital offences shall before passing sentence of death invite the blood relatives of the deceased person, if they can be found and brought to court, to express their wishes as to whether a death sentence shall be carried out and shall record such wishes in the record of the proceedings."

By *section 394* it is by consideration of this material (among other relevant matter) that the minister designated for the purpose recommends whether or not the Governor should exercise the prerogative of mercy.

The question that occurs to any person familiar with legal principles and having some knowledge of Nigeria is why it should have been thought necessary so to wreck the principles of justice as displayed hitherto by the British courts and judiciary. When it is recalled that Northern Nigeria is the third part of a Federation, the other two parts of which have orthodox legal systems embodying the principles of English justice, systems which are totally different from the one described, this legislation is disturbing indeed.

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THE NORTHERN NIGERIAN CODES

Mr. Price's article represents the attitude of a lawyer whose mind is conditioned by certain principles of English jurisprudence. Because the Northern Region Codes do not in their entirety conform to those principles he regards them as a " retrograde legislation." Prima facie many of his objections can be sustained particularly if English law is taken as the basis. But it is submitted, with respect, that the picture presented in the article is not complete, especially for a reader who is not conversant with the peculiar circumstances of the Northern Region of Nigeria.

It may be useful to amplify the part of the article dealing with the historical background to the legislation. The first step taken by the Northern Region Government towards this reform was to send three Delegations to Libya, Pakistan and Sudan " to see how countries with diverse populations and religious beliefs are administered after the attainment of self-government with particular reference to the legal system." [1] After the Delegations had reported a Panel of Jurists was set up under the Chairmanship of the Chief Justice of Sudan. Members of the Panel included the Chairman of the Law Commission in Pakistan and Professor J. N. D. Anderson of the School of Oriental and African Studies.

Their terms of reference were: " In the light of the legal and judicial systems obtaining in other parts of the world where Moslem and non-Moslem live side by side, and with particular reference to the systems obtaining in Libya, Pakistan and Sudan, to consider:

(a) the systems of law at present in force in the Northern Region, that is, English law as modified by Nigerian legislation, Moslem law and Customary law and the organisation of the courts and the judiciary enforcing the systems, and

(b) whether it is possible and how far it is desirable to avoid any conflict which may exist between the present system of law; and to make recommendations as to the means by which this object may be accomplished and as to the organisation of the courts and the judiciary, in so far as this may be desirable." [2]

The Recommendations of the Panel can be summarised as follows:

Northern Nigeria should adopt the Sudan Code which was simpler than the Nigerian Criminal Code and therefore more suited

[1] See Statement by the Government of the Northern Region on the reorganisation of the Legal and Judicial Systems of the Northern Region.

[2] See Statement by Northern Region Government, *op. cit.* The full report submitted by the Panel was not published.

to the circumstances in the north where the courts had no professional training. When the new Codes had been introduced Moslem law should apply only to the law of personal status and family relations and, when applicable, to civil cases. While the Codes should bind magistrates' courts and the High Courts, the native courts should only be guided by them for an interim period. Because of the technical nature of the new Code of Criminal Procedure which native courts would need time to grasp, it was recommended that the latter should not for some time be required to frame any formal charge under a specified section of the Code. It should suffice if the court told the accused the offence of which he was alleged to be guilty. Following the evidence of the prosecution witnesses the President should ask the accused to call his own defences.

All witnesses must be heard without discrimination; but they should not normally be put on oath though they should be sworn regarding the truth of that part of their evidence which was material to the determination of the case. It should be the duty of the court to test the reliability of a witness by questioning him and by putting to the witness such questions as the accused might suggest. The decision of the court should be based on the weight of all the evidence.

Bearing in mind the difficulties of the Alkali or judges of lower courts in learning an entirely new technique, the Appeal Courts should refrain from quashing the decisions of the former because of some minor defects. The appellate courts should seek to remedy faults by revising the judgment or sentence concerned or by sending the case back to the lower court for further evidence. To enable the Appeal Courts to approach legal problems without inhibition past decisions should not be binding on them.

Until the native courts have received adequate training and experience non-Moslems should be allowed to " opt out " of trial by Moslem courts and similar rights should be extended to Moslems who objected to trial by non-Moslem courts. Legal advocates should be excluded from the native courts.

It was further recommended that the Legal Training Wing of the Institute of Administration at Zaria (Northern Region) should undertake the training of administrative officers and the staff of native courts on how to apply the Codes.[3] The last recommendation of the Panel of Jurists was that the operation of the Codes should be reviewed after a period of three years to see what adjustments might be necessary in the light of experience.

All the recommendations were accepted by the Northern Region Government. The purpose of setting them out *in extenso* is to put the position in the Northern Region in its true perspective. Furthermore, of the estimated population of eighteen million in the Region

[3] It may be mentioned that over 100 Alkalis and native court Presidents have completed courses at this Institute.

73 per cent. are Moslems and the rest are pagans or Christians. The percentage of literacy in English in the North (though many people receive Arabic education) is the lowest in the whole Federation.

In his article Mr. Price stated that the British legal system with modifications had operated in the North for fifty years. But he should have gone further to say that, of the 700 African lawyers in the Federation, less than ten of them are Northerners.[4] The problem was how to draft a law which would be acceptable to all communities while at the same time keeping within the injunctions of the Qur'añ and Sunna.

Owing to lack of space it is not possible to comment on all points raised in Mr. Price's article or to write at length on the legislation itself. It may perhaps be mentioned that some of his objections were voiced on the floors of the Nigerian Regional and Federal legislatures before the Codes were passed into law.[5]

As a lawyer the writer shares Mr. Price's apprehension about the wide definition of " public servant " and the far-reaching powers vested in him by sections 10 and 136 of the Penal Code. Equally puzzling are sections 156–157 of the Criminal Procedure Code under which an accused is presumed guilty until he proves his innocence.

But much as the provisions of sections 144 and 148 of the Procedure Code may baffle an English lawyer (their effect being to make the court quasi-inquisitorial) the explanation of the Northern Region Attorney-General deserves some notice.[6] Addressing the Regional House of Assembly he referred to the then existing system under which the police framed the charge and presented it with their witnesses and the accused to the court. He pointed out that that system had led to many errors; the police were not conversant with the law or the proper way to prepare a charge. Consequently innocent people were wrongly prosecuted while some guilty persons must have gone unpunished. One may disapprove of this type of procedure in a mature legal system but it may be well to relate it to the social background and the general standard of developments in Northern Nigeria.

Closely related to the above are sections 381–382 of the Procedure Code already quoted by Mr. Price. People who are without much education can hardly be expected to master elaborate legislation such as these Codes, immediately they reach the Statute Book. And sections 381–382 did no more than implement the recommendation of the Panel of Jurists. Furthermore, to the extent that the accused is informed in the language he can understand, of the

[4] See Report of the Committee on Legal Education for Students from Africa, Cmnd. 1255, 1961.

[5] See Debates: Northern House of Assembly 13/8/59, Coll. 482–685; 29/4/60, Coll. 619–694; Federal House of Representatives, 29/4/60, Coll. 2052–2081.

[6] See Debates, N.H.A. 24/9/60, Col. 625.

offence he is alleged to have committed, it seems that the end of justice is served notwithstanding the absence of a formal charge.

Reference was made by Mr. Price to the Nigerian Bill of Rights which he does not appear to have seen. Only one subsection of the Fundamental Rights provisions of the Nigerian Constitution might be regarded as conflicting with sections 156 and 157 (1) of the Criminal Procedure Code. Section 156 provides: " When the accused appears or is brought before the magistrate the particulars of the offence of which he is accused shall be stated to him and he shall be asked if he has any cause to show why he should not be convicted." According to section 157 (1), " If the accused admits that he has committed the offence of which he is accused his admission shall be recorded as nearly as possible in the words used by him and if he shows no sufficient cause why he should not be convicted the magistrate may convict him accordingly, and in that case it shall not be necessary to frame a formal charge."

The above sections have to be read together with section 21 (4) of the Nigerian Constitution (Fundamental Rights) which provides: " Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty: Provided that nothing in the section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts." Sections 156–157 of the Criminal Procedure Code are capable of being construed as having shifted the burden of proof on to the accused person, and in that event the Supreme Court may well rule that one of his fundamental rights has been infringed. Even if it can be argued that that is not the intention of the sections, the objection remains that clarity is not the merit of this part of the Code.

There are undoubtedly certain provisions of the Codes which may outrage a lawyer's notion of the ideal criminal law; but few people will agree with Mr. Price that the whole body of legislation is a " retrograde " step. Rather than that, considering the state of the law before the Codes were promulgated, the legislation was only a little short of a revolution in the Region.

Olu Odumosu.*

* ll.m. (Lond.).

A MAJOR ADVANCE

THE article by Mr. Price entitled " Retrograde Legislation in Northern Nigeria? " represents, with respect, such a travesty of the facts that it demands an immediate reply; and the background notes by Mr. Olu Odumosu—sound, helpful and pertinent as they are—require considerable amplification.

The first essential is to grasp the almost revolutionary differences between the systems of law obtaining in the Northern Region before and after this " retrograde legislation " came into effect. Then, as now, some 95 per cent. of all litigation was in the hands of the native courts, and only some 5 per cent. was handled by the magistrates' courts and the High Court. But prior to this legislation the native courts applied " native law and custom " (or, in the Muslim courts, a compound of Islamic law, according to Maliki principles, together with a certain amount of indigenous customary law) to the virtual exclusion of any other system—and in homicide cases this meant, *inter alia*, that their definition of " deliberate homicide " was very much wider than the offence of " murder " under the Nigerian Criminal Code, and that even the most severe provocation was normally regarded as irrelevant; that the punishment of one convicted of " deliberate homicide " rested, in most cases, entirely on the whim of the " heirs of blood," who might demand the death penalty, accept blood-money, or waive any claim whatever and leave the criminal to a prescribed penalty of trifling dimensions; and that the relatives of a non-Muslim could never claim the death penalty against a Muslim " murderer " but only (in the case of pagans) one-fifteenth of the blood-money due for a Muslim, whereas the death penalty could certainly have been demanded had the religions of the killer and his victim been reversed. It is true that comparatively recent legislation had prescribed that the native courts must not, in fact, impose any penalty under native law and custom in excess of that applicable under the Code for the act or omission concerned; but this most salutary reform had proved exceedingly difficult to apply. It is also true that any gross injustice based on differences of religion had been regularly avoided by the expedient of a British administrative officer exercising his discretionary right to transfer the case to the High Court; but how far this expedient would be available in an independent Nigeria was open to question.

As for the procedure followed in these courts, this was not only somewhat " inquisitorial " but rigid to a degree. Non-Muslim witnesses were regarded as totally ineligible in the more strictly orthodox courts, at least in any case in which Muslims were involved; the testimony of women or of any " interested party "

was considered wholly inadmissible in any criminal prosecution; and conviction in homicide cases—including the death penalty, where applicable—turned, in default of a confession by the accused or the testimony of two eligible witnesses to the very act, on whether or not the heirs of blood were prepared to swear fifty oaths, however blindly, to the fact that the accused had done the deed, or that their kinsman's subsequent death was directly due to the blow which the accused was known to have inflicted on him.

Nor did the anomalies stop at this point. In the Islamic criminal law there are some six or seven offences, meticulously defined in the classical texts, which carry prescribed punishments—most of them exceedingly severe. For the rest, however, the texts merely prescribe that all other wrongdoing shall be suitably punished. This gave the native courts an almost unfettered discretion both in the definition of alleged offences—even those with a political flavour—and also in their punishment, and so left the door wide open to hostile comment.

These examples are, perhaps, sufficient to give some conception of the substantive and procedural law previously applicable in the native courts. But it must also be emphasised that the native courts in Muslim areas—and some 66 per cent. of the inhabitants of the Region are Muslims, of varying degrees of orthodoxy—were deeply imbued with this system, which they regarded as divinely prescribed. It was only a tiny minority of cases which ever found their way to the " British " courts; and while the British judges and magistrates—as always—had established a high reputation for their personal integrity, it must be recognised that the system of law and procedure they applied was so remote from native concepts as to remain for most Northern Nigerians, participants and spectators alike, an inexplicable mystery.

Such, then, was the situation with which the Panel of Jurists,[1] to which Mr. Price refers, was confronted. It seemed clear to the overseas members, therefore (in spite of the fact that two of the three were convinced Muslims), that the only adequate solution would be for the Northern Nigerian Government to replace the criminal law of the native courts, both substantive and procedural, by suitable codes. Such, however, was the dead weight, in the North, of rigidly traditional opinion, that we were repeatedly warned that to make any such recommendation would be equivalent to crying for the moon; and it is to the eternal credit of the Northern Nigerian Government that they not only saw the need for such a revolutionary change but also had the courage and determination to carry it into effect, in the teeth of considerable opposition.

One thing, however, was clear to us from the first: that we must

[1] On which I myself had the honour to serve. Our Chairman was the Chief Justice of the Sudan, while the then Chairman of the Pakistan Law Reform Committee, together with three Northern Nigerians, completed our number.

recommend codes along the lines of those obtaining in the Sudan, India and Pakistan in preference to the existing legislation applied by the " British " courts in Nigeria—even though this would mean a certain divergence between the law applicable in the different Regions. This decision was forced upon us partly because the Nigerian Criminal Code had got such a bad name in the North (however undeserved this might be) that Muslim opinion would never have accepted it; partly because the Chief Justice of the Sudan and the Chairman of the Pakistan Law Reform Committee felt themselves able to assure the local Muslims that the Sudanese and Indian Codes were in no way contrary to Muslim principles; and partly because these codes are considerably simpler for untrained courts to apply. Even so, a few special concessions to Muslim sentiments [2] had to be inserted in these codes during the process of drafting and debate, and much opposition had to be overcome; so to have suggested that these codes should be applied in the native courts but not in the magistrates' courts and the High Court would almost certainly have resulted in their total rejection —quite apart from the fact that it was vital to unify the law, so far as this was possible, throughout the Region. Even if this had involved a minor change for the worse in the system applicable to only 5 per cent. of the cases, in order to secure an overwhelming improvement in the system applicable to the remaining 95 per cent., could this fairly be described as " retrograde legislation "? [3]

What, then, is the present position, in broad perspective? First, the old system of law and procedure in criminal cases has been completely replaced, in so far as statute law is concerned, by the new codes—and every effort is being made to train the personnel of the innumerable native courts, of all grades, in their application. There are now various degrees of culpable homicide; there is no difference between the sentence passed on a Muslim or non-Muslim killer; and the punishment due to a " murderer " no longer depends in any way on the whim of the heirs of blood. The only marginal relic of the old system is the fact (commented on by Mr. Price) that the attitude of the heirs of blood may constitute *one* factor in a general consideration of the Governor's prerogative of mercy.[4] To say that this provision—designed, no doubt, partly to conciliate Muslim sentiments, and partly to allow the court to take payment of blood-money into account in assessing the appropriate sentence of imprisonment [5] where the death penalty is not imposed—means that the convicted person's life or death " is dependent to a substantial extent on the views of the deceased's relations," appears to represent a gratuitous assumption.

[2] Such as the provisions regarding the drinking of alcohol, etc.

[3] In point of fact the Indian Penal Code and Code of Criminal Procedure, on which the new legislation in Northern Nigeria ultimately depends, have stood the test for a century. They were, moreover, designed to meet conditions very similar to those which obtain in Northern Nigeria today.

[4] ss. 393–394. [5] The danger of blood feuds in such cases must never be forgotten.

Secondly, no one can now be punished for any offence not prescribed as such in some statutory provision. This represents an enormous advance. It is true that the Panel recommended that for an interim period the native courts should be " guided " rather than " bound " by the new codes; for there was no possibility that the personnel of all the native courts—many of them with very scanty educational qualifications—could switch over to a wholly new system overnight. It was for this reason that we suggested that it should not vitiate a trial if the precise charge, in terms of the relevant section of the Penal Code, were not specified, *provided that the prisoner was clearly told of what he was being accused* (*e.g.*, of having stolen a goat),[6] and provided, of course, he was not given a sentence in excess of that provided under the relevant section. To make an issue out of this salutary provision—in the circumstances at present prevailing in the Northern Region—seems to me quite unjustifiable.

Thirdly, all witnesses—whatever their religion, sex or " interest " in the case—must now be heard, and the court must reach its decision after taking all this evidence into consideration. As is common to native courts throughout most of Africa, except only where the court holder is a qualified barrister, legal representation is not permitted; but the accused is allowed, through the court, to ask the prosecution witnesses any relevant questions, and to produce any witnesses he likes in rebuttal. The differences between this and the previous system are almost revolutionary.

Fourthly, the courts have been reorganised in such a way that all appeals, and sometimes cases in first instance, will go to a court which is completely independent of the local Emir—whether this be direct to the High Court or to one of the new Provincial Native Courts [7] which this " retrograde legislation " established in each Province.

Space forbids any adequate treatment of every detail to which Mr. Price takes exception. Those criticisms which concern points which have not yet been mentioned may, however, be broadly classified under two headings: first, those in which he takes what seems to be an unnecessarily sombre view, and secondly, those in which he appears to labour under an almost complete misapprehension. It must, however, be stated that he has frequently—although no doubt unintentionally—dealt with his material in the most inadequate way, sometimes omitting words or sections which are

6 Thus s. 387 of the Criminal Procedure Code provides that " it shall be sufficient in any trial before a native court to have, instead of a formal charge, a statement of the offence complained of, with the date and place and, when material, the value of the property in respect of which the offence has been committed." Similarly, s. 388 enacts that, when this procedure is followed, any conviction " shall be stated with a reference to the appropriate section of the Penal Code or other Ordinance or Law under which in the opinion of the Court an offence has been committed. . . . "

7 With a further appeal to the High Court. Thus appeals from native courts in all cases go to the High Court as of right, whether directly or indirectly.

essential to a right understanding of the subject under discussion. Of this a single instance must suffice. Almost at the end of his article Mr. Price quotes the first few lines of section 389: " Upon charging an accused person a native court shall call upon him to state his defence and to inform the court of the names and whereabouts of any witnesses. . . ." The simple expedient of completing the quotation (which in fact continues " . . . whom he intends to call in his defence, and the court shall procure the attendance of such witnesses and hear their evidence ") would have made it clear that the purpose of this section is not to embarrass the accused, but to help him.

Under points regarding which Mr. Price takes what seems to be an unnecessarily sombre view may be mentioned the provision in section 136 of the Penal Code that " Whoever being required by a summons, notice, order or proclamation proceeding from any public servant legally competent as such public servant to issue the same to attend . . . at a certain time and place, intentionally and without reasonable cause refuses or omits to attend . . . , shall be punished."

As a matter of fact, Mr. Price is, it is submitted, incorrect in supposing that this section would cover a police officer who may " require the attendance before him of any person being within the limits of his own police district whose evidence appears likely to be of assistance . . ." for it seems probable that sections 136 and 137 of the Penal Code refer only to documents of a formal character which have been served or published, and this would scarcely apply to a police officer's requirements under section 123 of the Criminal Procedure Code. It is certainly true, however (although Mr. Price does not mention this), that section 150 of the Penal Code would provide a sanction for a refusal to answer questions put by the police (or any public servant) in the exercise of their lawful powers. But is this, in sober fact, so sinister a provision as to justify the phrase " retrograde legislation "—particularly when taken in conjunction first with the caveat, which Mr. Price mentions, that a person shall not be bound to answer " if his answer would tend to expose him to a criminal charge " and secondly with the provisions of section 124 (1) of the Criminal Procedure Code, which Mr. Price does not quote, that " No police officer or person in authority shall make use of any threat or of any promise of an advantage towards any person in an investigation under this chapter in order to influence the evidence he may give "? Much the same also applies to the provision which makes it a punishable offence for someone to refuse to sign a statement he has made when required to do so by a public servant legally competent to require this.[8] Almost certainly, again, this does not apply to an examination of a witness by the police; but would it be so very sinister if it did?

Again, Mr. Price emphasises that the police are required to send

[8] s. 143 of the Penal Code.

their " First Information Report " (including any " grounds for suspicion ") to the appropriate court for instructions,[9] and that the court may also, at its *discretion*, ask to see the " case diary." [10] It is perfectly true that this may mean that the court which ultimately tries the case may have some previous knowledge of its antecedents—which may, of course, be regarded as undesirable in principle. What needs emphasis, however, is first that the *reason* for this provision is a desire to protect—not to prejudice—the interests of the accused, by ensuring that inexperienced police do not prosecute him, or delay his prosecution, without adequate reason; that there is nothing alien to the regular practice of the native courts in this somewhat inquisitorial procedure—and it must be remembered that the native courts handle the overwhelming majority of all litigation; and that there is nothing to prevent a magistrate who feels prejudiced by what he has already learnt of a case from asking that someone else should conduct the trial.

Under criticisms in which Mr. Price appears to labour under an almost complete misapprehension may be mentioned, first, his sweeping assertion that by this legislation " the magistrate becomes an official of the Executive and his detachment is destroyed. By these means his status is reduced. As a counter to possible tyranny and as a social force he has been eliminated." This is an irresponsible allegation and a travesty of the facts.

Mr. Price, as it seems to me, has fallen into the error into which so many English lawyers are prone to slip. He automatically assumes that an institution which has matured in England is necessarily an ideal model for a system of law in any part of the world. He ignores the wise caution of Lord Denning in the *Nyali Bridge* case and seems to take it for granted that a system of procedure adapted, by an accident of history, to a different environment, different circumstances and, indeed, to a different age, must necessarily be ideally fitted for an emergent African state today. Our trial procedure, as Mr. Justice Devlin's book on *Trial by Jury* makes plain, is subject to a good deal of criticism even at home. Why, then, should the accusatorial system, which is in any case peculiar to the British Commonwealth and the U.S.A., be necessarily adopted in its entirety in a country where a number of different considerations may apply? Here in England, for example, when evidence is not brought by the prosecution, it can generally be assumed that such evidence does not exist; for the police have at their disposal the skill of scientists, experts and specialists of all sorts, together with the advice of learned counsel. The defence, similarly, has the assistance of legal practitioners and a wide choice of specialists on numberless subjects is at its disposal; so, if the defence does not produce any evidence in favour of the accused, one

[9] ss. 117 and 118 of the Criminal Procedure Code.
[10] s. 144.

may legitimately presume that it is not available. In such circumstances there may be little harm, and considerable advantage, in the judge acting as no more than an arbiter between the two contesting parties. In Nigeria, on the other hand, the failure of the native authority police to bring certain evidence may be due to a number of reasons, and the failure of the defence to produce similar evidence may be due to the inexperience of the accused, the fact that he can have no one to represent him in certain cases, and to his general poverty and embarrassment. It is in these conditions that the role of the silent umpire needs to be reinforced, in certain circumstances, by that of an upright and independent investigating magistrate.

Turning to specific points, I can see no justification for Mr. Price's assumption that section 158 of the Criminal Procedure Code implies that the accused must postpone all the questions he wishes to put to prosecution witnesses until the prosecution's case has been ended. There is nothing in section 158 to support this; and section 162 specifically provides the accused with *another* opportunity, at the conclusion of the case for the prosecution, to " cross-examine or *further cross-examine* [11] any . . . of the witnesses for the prosecution whose evidence has been taken." It seems clear that this does not in any way preclude the accused from questioning each witness, in the normal way, when he gives evidence; instead, it confers a further right on the accused, once he has been informed of the charge, to recall any witness for further questioning in order to bring out any points which he may feel will help him in refuting it. As for trials in native courts, section 391 (3) specifically provides that " After hearing the evidence of *any witness*,[11] a native court shall ask an accused person if there is any question which he wishes the court to put to the witness on his behalf."

Again, it is a travesty of the facts to assert that the accused must " prove his innocence." Mr. Price bases this assertion on the fact that an accused person, on being informed by the magistrate of his alleged offence, is asked to " show cause why he should not be convicted." [12] But he does not make the point that this procedure applies only in a minority of cases where the Governor by Order in Council has allowed a special " summary " procedure. Even so, it means no more than that the accused is asked to specify his defence to the charge; he is certainly *not* presumed to be guilty. On the contrary, it is only where he admits that he has committed an offence, and his admission has been recorded as nearly as possible in his own words, that " if he shows no sufficient cause why he should not be convicted the magistrate may convict him accordingly." [13] Where, on the other hand, " an accused person states that he intends to show cause why he should not be convicted " the

[11] The italics are mine.
[12] s. 156 of the Criminal Procedure Code.
[13] s. 157 (1) of the Criminal Procedure Code.

prosecution has to prove the case against him, as is apparent from section 159 (1), which reads: " If upon taking all the evidence . . . and making such examination of the accused as the magistrate thinks necessary for the purpose of enabling him to explain any circumstances appearing in the evidence the magistrate finds that no case against the accused has been made out which if not rebutted would warrant his conviction, the magistrate shall discharge him." Again, section 162 (1) makes specific provision for an accused who " pleads not guilty or makes no plea or refuses to plead." It is true that subsection (4) of the same section provides that after the completion of the case for the prosecution—and any cross-examination of the prosecution witnesses—the accused shall be " called upon to enter upon his defence and produce his evidence." But the fact that he does not have to " prove his innocence " is sufficiently apparent from section 191 (3), which provides that after hearing the evidence for the prosecution the High Court may, " if it considers that the evidence against the accused . . . is not sufficient to justify the continuance of the trial, record a finding of not guilty . . . without calling upon him . . . to enter upon the defence. . . ." It may be observed in passing that words exactly similar to section 156 are used in the Indian legislation; but the guilt of the accused must *always* be proved by the prosecution, except only in the case of a full—and acceptable—confession.

Similarly, the provision that in section 168 (9) of the Criminal Procedure Code a magistrate may, at the conclusion of the prosecution's case, " examine him generally on the case for the purpose of enabling him to explain any circumstances in the evidence " is designed to help the accused to understand what he has to answer, and to " discover his line of defence," not to convict him. Again, the fact that the court may at any stage, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, put such questions to him as it considers necessary and that, while he need not answer these questions, the court may " draw such inference from such refusal as it thinks fit " [14] may, certainly, aid the magistrate at arriving at the truth—and thereby prejudice the chances of a guilty man escaping punishment; but it seems quite unwarranted to regard this as a denial of justice, particularly in circumstances where no jury is involved; and to say that " the golden thread of British criminal justice, that it is for the prosecution to prove its case and not for the accused to prove his innocence, has been completely broken " is sheer nonsence.

As a matter of fact, section 235 (4)—to which the Indian Code of Criminal Procedure has no parallel—specifically states that " The sole purpose of such examination shall be to discover the line of defence and to make clear to the accused the particular points in

[14] S. 235 (1) and (2). But Mr. Price goes too far when he states that the court is " enjoined " to do this; for the provision is permissive, not mandatory.

the case for the prosecution which he has to meet in his defence and there shall be nothing in the nature of a general cross-examination for the purpose of establishing the guilt of the accused." Indeed, section 168 (9) itself expressly provides that " nothing in this examination shall be in the nature of a general cross-examination for the purpose of establishing the guilt of the accused." Properly used—and subsection (4) above requires this—this provision may prove helpful to the accused as well as to the court.

Very similar is the allegation that the provision of section 381 of the Criminal Procedure Code (" No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of an appeal court or reviewing authority a failure of justice has in fact been occasioned thereby ") will " put upon an appellant the onus of proving his innocence in relation to a charge never made to the appellate court before any relief can be obtained." This is ridiculous. Section 156 provides that when an accused appears before a magistrate " the particulars of the offence of which he is accused shall be stated to him," while section 387 states that " it shall be sufficient in any trial before a native court to have, instead of a formal charge, a statement of the offence complained of with the date and place . . ."; so what section 381 really means is that an appellant who has been found guilty of some offence, after being told—at the beginning of his trial—of what he was accused, will not succeed in his appeal merely by reason of showing that he was not charged under some specific section of the Code, but only if he can show that some failure of justice has occurred (such, for instance, as a sentence in excess of that provided under the section under which he should have been charged). Similarly, under section 382, the appellate court is not to quash a conviction merely because of some failure, by the lower court, to conduct the case in the way which might be demanded of a more sophisticated tribunal: for example, if an official of a native authority has been duly found guilty of corruption and convicted of the offence of a public servant dishonestly receiving money, his conviction is not to be quashed merely because the native court did not realise it was necessary for it to demand formal proof that the accused occupied the office which everyone knew him to occupy—in spite of the fact that this is, of course, a necessary ingredient in the offence. Instead, such omissions are to be suitably remedied. But can any fair-minded person regard this as a miscarriage of justice, against the background of a police force and judicial personnel which is largely untrained? To comment on this that " the general public might well think that when a man had been tried, found guilty and sentenced (in a native court, possibly to death) without ever having had the charge against him framed or put, a failure of justice would *ipso facto* occur " represents a hopeless confusion between the *form* of the charge and the *substance* of justice. As for the allegation

that the accused must " prove his innocence," this has already been refuted.

Almost exactly similar, again, is the allegation that section 382 of the Criminal Procedure Code, when taken together with other sections, means that " an appellant against whom a defective summons has been served bringing him to court to trial on a charge which is never framed or put to him, after which a number of irregularities occur and against whom the magistrate finally gives a judgment which omits to take cognisance of a technical aspect of the law, is without redress in the appellate court unless he can demonstrate his innocence (' a failure of justice ') of a charge which has never been made." This is sheer perversion of the true position. He does *not* have to demonstrate his innocence, but merely to show that some irregularity in his trial—for an offence of which he was duly informed, even if not precisely charged under the Code—might well have prejudiced the issue, and he will then be entitled to succeed in his appeal. It is well known that in India, for example —where the Procedure Code runs on similar lines—appeals of this sort are frequently successful.

The following sections—not noticed by Mr. Price—tell their own story:

" If any appellate court is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it may direct a new trial to be had upon a charge framed in whatever manner it thinks fit." [15]

" A court exercising appellate jurisdiction shall not . . . interfere with the finding or sentence or other order of the lower court on the ground only that . . . there has been a technical irregularity in precedure, if it is satisfied that the accused has not been prejudiced in his defence and that the finding and sentence or order are correct." [16] How Mr. Price can suggest that this legislation, which in fact heralded the most signal advance in justice and civil rights in the Northern Region of Nigeria (as best exemplified, perhaps, in the fact that now—in marked contrast to the past—no one can be convicted of a criminal offence except under the Penal Code or some other statutory enactment), may have opened the door to a military dictatorship, passes my powers of comprehension.

J. N. D. Anderson.*

[15] Criminal Procedure Code, s. 222.
[16] s. 288.

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NOTES OF CASES

The Ladies' Directory and Criminal Conspiracy
The Judge as Custos Morum

When Parliament attempted to drive prostitutes off the streets by imposing heavier penalties for solicitation in the Street Offences Act, 1959, it was foreseen that there would be an increase in the number of dubious advertisements in shop-windows by persons offering their services as models, masseuses, and the like. It was also feared by some that the activities of touts and ponces would increase and the whole business would become highly organised. But few can have imagined that someone would produce a magazine giving the names, addresses and telephone numbers of prostitutes, and in some cases photographs, and in others, references to the services offered to sexual perverts. No provisions were inserted in the Act of 1959 dealing with such activities.

Frederic Charles Shaw saw the possibilities of exploiting the situation to make some money by publishing the booklet or magazine called the *Ladies' Directory*, which landed him in the dock at the Old Bailey. He was charged on an indictment containing three counts, as follows:

(1) conspiracy to corrupt public morals (the conspiracy being with those who inserted the advertisements, and certain other persons unknown);
(2) living on the earnings of prostitution, contrary to section 30, Sexual Offences Act, 1956;
(3) publishing an obscene article, contrary to section 2, Obscene Publications Act, 1959.

At the trial, the late Judge Maxwell Turner had ruled that a conspiracy to debauch and corrupt public morals was a common law misdemeanour and was indictable as such. He also held that there was evidence for the jury to consider on the count relating to living on the earnings of prostitution, and directed them on the test to be applied in relation to the obscenity charge. The jury convicted Shaw on all three counts, and he was sentenced to nine months' imprisonment.

He appealed to the Court of Criminal Appeal against conviction, claiming that (1) there was no such offence at common law as a conspiracy to corrupt public morals unless the acts alleged were offences against the criminal law or amounted to a civil wrong; (2) in regard to the count for living on the earnings of prostitution, a distinction should have been drawn between services supplied to a prostitute for reward and the mere receipt of the earnings of a prostitute; (3) there was a misdirection on the count alleging an

obscene publication. There were several other less important grounds of appeal, including one which claimed that the publication of the magazine was in the public interest, and therefore not criminal! Shaw also appealed unsuccessfully against sentence.

In a reserved judgment delivered by Ashworth J.,[1] the Court of Criminal Appeal, consisting of Lord Parker C.J., Streatfeild and Ashworth JJ., dismissed the appeal on all grounds, and leave to appeal to the House of Lords was granted, limited to the first two grounds. In argument, the prosecution had conceded that, in regard to the conspiracy count, the conspiracy alleged was to do an unlawful act, and not a conspiracy to do a lawful act by unlawful means. The unlawful act which was alleged was the common law misdemeanour of corrupting public morals, which might arise in two ways, either (1) any act calculated or intended to corrupt the morals of the public in general, or (2) any act calculated or intended to outrage public decency. The Court of Criminal Appeal held that it was an established principle of the common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable offence.

The House of Lords upheld the conviction on counts 1 and 2, but there was an interesting and important divergence of opinion between the majority and Lord Reid on the precise grounds on which such a decision should rest.[2]

Living on the earnings of prostitution

Dealing with the offence of living on the earnings of prostitution first, Viscount Simonds said that the law does not seek to include " every person whose livelihood depends in whole or in part upon the payment to him by prostitutes for services rendered or goods supplied, clear though it may be that payment is made out of the earnings of prostitution." [3] It must be left to a jury to say in regard to any particular conduct whether the statutory offence has been committed. A person does not necessarily escape, however, by receiving payment for the goods or services that he supplies to a prostitute which he would not have supplied but for the fact that she was a prostitute.

Lord Reid expressed the scope of the offence more clearly when he described the statute as being aimed at persons in a parasitic relationship to the prostitute or to a number of them.[4] He is a little alarmed at the wide import of the remarks made by Viscount Simonds on this subject, especially in relation to their possible application to landlords letting premises to prostitutes, and to tradesmen supplying goods or services to a prostitute. For his part,

1 The judgment of the Court of Criminal Appeal is printed before the report of the case in the House of Lords, see *Shaw* v. *D.P.P.* [1961] 2 W.L.R. 897 at 902 *et seq.*
2 *Ibid.* p. 912 *et seq.*
3 p. 913.
4 p. 919.

Lord Reid could not hold that there should be any severe limitation on the tradesman supplying goods or services to a prostitute in the ordinary course of his business. Presumably this would extend to the more unusual commissions, provided they are received and dealt with in the course of a normal, respectable, business. Both the learned lords found great difficulty in knowing where to draw the line over this business of living on the earnings of prostitution, and Viscount Simonds said that the jury must be directed that some limitation must be put on the words,[5] while Lord Reid thought that if they were given their ordinary and natural meaning, that would be a clear enough limitation.[6] It is conceived that the two speeches give a useful guide for the future, if taken together, though there might have been some difficulty if Lord Reid had not qualified what Viscount Simonds said.

Conspiracy to corrupt public morals

It is on the subject of the conspiracy count that the views of their lordships diverged most markedly. Viscount Simonds and the majority were prepared to assert quite strongly that there was an offence of conspiracy to corrupt public morals which was known to the common law, but it is not quite clear whether this assertion carries with it the finding that there is an offence of corrupting public morals where there is only one person involved. It would appear from Viscount Simonds' speech that he assumed that there is. He entertained no doubt that in the sphere of criminal law there remained in the courts of law " a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for." [7]

He accepts Lord Mansfield's claim that the courts are *custodes morum*, without placing this in its historical context. He is willing to concede that the occasions for the exercise of such residual power by the judges will be rare today, " for Parliament has not been slow to legislate when attention has been sufficiently aroused." [8] But gaps remain, and the judges can and must fill these gaps by means of judicial legislation. In a curious sentence at the outset of his speech he prefaces his sweeping claims to judicial power by a rhetorical question to the effect that he need not say that he is not an advocate of the right of the judges to create criminal offences.[9] Somehow the double negative here seems to be a little misplaced ! Where in the books will one find the common law misdemeanour of corrupting public morals ? In none to my knowledge. Where in the

[5] p. 914.
[6] p. 921.
[7] p. 917.
[8] p. 918.
[9] p. 916.

modern cases? In none to my knowledge. As for the uncertainty which springs from this approach, he believes the matter can safely be left to the jury, which may be an answer to fears of undue judicial innovation, but can hardly assist the legal adviser in deciding whether a proposed course of action by a client is criminal or not. For such a person, Lord Reid's views may have more appeal: "In other words, you cannot tell what is criminal except by guessing what view a jury will take, and juries' views may vary and may change with the passing of time." [10]

Lord Morris, too, placed his faith in juries in a characteristic judgment: "Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved." [11] But juries are directed by judges, and the result is that to a very large extent we are constituting an Old Bailey judge and jury as guardians of our moral welfare as a public and as interpreters of what is good for us. And this in an area where some of the most controversial moral issues of our time arise, and where there is already a corpus of legislation which presumably expresses the will of the people, as interpreted in another place.

Lord Reid's dissent on the conspiracy count will probably be classed by future generations along with some of Lord Atkin's famous speeches as containing sounder doctrine than the majority view. Many who have long striven to have the criminal law based upon a modern appreciation of the use to which its armoury can best be put will recognise the more authentic note struck by Lord Reid, and will welcome the brave and courageous way in which he flatly contradicts his brother judges on the question whether there is such a general offence known to the law as conspiracy to corrupt public morals ("there is no such general offence"). He relies heavily on the celebrated monograph on the *Law of Criminal Conspiracies* by R. S. Wright (later Wright J.) from which he quotes the following significant passage:

> "In an imperfect system of criminal law the doctrine of criminal agreements for acts not criminal may be of great practical value for the punishment of persons for acts which are not, but which ought to be made punishable irrespective of agreement. . . ." [12]

But, says Lord Reid, even if there is still a vestigial power of this kind, it ought not to be used unless there is general agreement that the offence to which it is applied ought to be criminal if committed by an individual. There are wide differences of opinion today about how far the law should go to punish immoral acts which are not

[10] p. 929.
[11] p. 938.
[12] p. 923. The passage comes from p. 88 of Wright's book, which was published in 1873.

done in the face of the public. Parliament is the proper place, indeed the only place, to settle such matters. "Where Parliament fears to tread it is not for the courts to rush in." [13] Lord Reid might well have finished the quotation from Wright's book:

> "... but this use of the doctrine involves an important delegation of a legislative power in a matter in which the exercise of such power ought to be carefully guarded, since the legislature admits its own inability to discover the principles on which legislation ought to proceed."

In Lord Reid's view, the courts cannot now create a new offence, or a new kind of criminal conspiracy, or at least, if any such power still exists, this is not a proper sphere in which to exercise it. He reviews the authorities, both in case-law and in the classic texts, and finds nothing to indicate that there is such a general and far-reaching offence as conspiracy to corrupt public morals. In Lord Reid's view, a narrower direction would have been possible and more acceptable to him, confining the jury's attention to the public invitation to indulge in acts of sexual perversion, which was contained in some of the advertisements.[14] Lord Tucker also referred to this aspect of the case, which he regarded as conclusive in favour of the prosecution.[15] On this point, Lord Hodson observed, however, and, it is submitted, rightly so, that although there were these references in some of the advertisements, they added nothing to the substance of the charge of conspiracy to corrupt public morals, and amounted in the main to no more than references to the usual incidents associated with prostitution and irregular sexual intercourse.[16]

Lord Tucker's speech contains a very careful review of the authorities. He prefers to base his support for the conspiracy count on the argument that this is really only a particular instance of a conspiracy to effect a public mischief. If it had been so argued, then indeed we might all have been saved a lot of trouble, but in fact the case cannot be viewed in this light, and dismissed on the ground that there is respectable authority for the view that conspiracy to commit a public mischief is a crime. One of the mysteries of the case is that the prosecution was framed in terms of conspiracy to corrupt public morals, and then argued on the basis that this was a conspiracy to do an unlawful act, *viz.*, to corrupt public morals, itself a substantive misdemeanour at common law. This probably was done to avoid arguing on the basis of the much criticised law relating to public mischief.[17] Be that as it may,

[13] p. 924. [14] p. 928. [15] p. 935. [16] p. 939.

[17] The prosecution accepted the now traditional definition of conspiracy, that it is an agreement to do an unlawful act or to do a lawful act by unlawful means, which Wright describes as Lord Denman's antithesis, and which he maintains was never intended as a definition: *ibid.*, 65. He shows that it cannot be and cannot have been intended to be a complete definition of criminal combination despite its use as such by Willes J. in the House of Lords in *Mulcahy* v. *R.* (1868) L.R. 3 H.L. 306 at p. 317.

Lord Tucker's judgment appears to represent a distinct recognition of the notion of public mischief as a foundation for a conspiracy charge, as well as a recognition of the notion of conspiracy to corrupt public morals.

Two questions

Two questions remain for consideration. The first is, which side has the better of the argument? The reader must make his own choice. It is submitted, however, that anyone who has studied the anxious researches in this field of Wright, Winfield,[18] Sayre,[19] and who is familiar with the outspoken comments and criticisms of Stephen,[20] Stallybrass [21] and Glanville Williams [22] on the claims of the judges to define acts as criminal and to act as *custodes morum*, will be inclined to look suspiciously at any new move by the judges to resurrect their common law powers and exercise them, and will conclude that such developments must be stubbornly and steadfastly resisted. It may well be that there are gaps in the law which ought to be filled, but it does not by any means follow that the judges are the most suitable agents for the task. That the judges have not always responded to such situations by making new law has been abundantly shown in Dr. Glanville Williams' treatise,[23] and maybe they render a better service to the common law by drawing attention to the gaps and calling for legislative action as a matter of urgency. To invoke the common law powers is to be guilty of a judicial folly which besmirches the fair name of the common law, so that it is hard to describe it any more in Lord Radcliffe's picturesque phrase in his Rosenthal Lecture, quoted by Viscount Simonds.[24]

The second question concerns the future of the English law of criminal conspiracy. Surely the time has come to refer the whole matter to the Criminal Law Revision Committee? It is widely recognised that many aspects of the law relating to criminal conspiracy are unsatisfactory. The Criminal Code Commissioners recommended a definite list of criminal conspiracies, and the Draft Code of 1879 proposed a similar fairly precise definition. Some countries have adopted this policy.[25] It is submitted that we should look at the whole matter again, as a matter of urgency.

J. E. HALL WILLIAMS.

18 P. H. Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1921).
19 35 Harv.L.R. 393.
20 H.C.L., iii, 359.
21 (1933) 49 L.Q.R. 183, reprinted in *The Modern Approach to Criminal Law*, ed. Radzinowicz and Turner (1948), p. 66 *et seq.*
22 *Criminal Law: The General Part* (1953), § 133, p. 450 *et seq.*, §§ 168, 169, p. 549 *et seq.*
23 *Ibid.* pp. 452–453.
24 The phrase referred to by Viscount Simonds is where he remarks that there are still "unravished remnants of the common law." It is understood that this comes from the Julius Rosenthal lecture delivered by Lord Radcliffe in 1960, "Law and its Compass" (Northwestern University Press).
25 See details in Glanville Williams, *op. cit.*, p. 559.

The Cement Makers' Agreement: Risk and Prices

The Restrictive Practices Court upheld the agreement between the members of the Cement Makers' Federation to charge identical prices at the point of delivery to customers.[1] Perhaps the main point of interest in the case is that this is the first time that it has been accepted by the court that a restrictive agreement resulted in lower prices and thus conferred a substantial benefit on buyers. Since the general line of argument could apply to many other industries, the decision may establish an important precedent.

The Federation's main argument was that, for the increasing demand for cement to be met, new capacity must be installed. Firms would instal new capacity only if they expected it to provide an adequate return on the capital invested taking the risk into account. Thus, in free competition, supply and demand would result in a price sufficiently high to induce new investment. Since the existence of the agreement eliminated some of the risk, the members of the Federation were prepared to accept a lower return on capital and so could meet the demand at lower prices.

Evidence was produced to establish that the scheme had, in the past, been operated to charge low prices as compared with free competition. An accountant calculated that, to secure the rate of return on capital employed which would be required in conditions of free competition (15 to 20 per cent.), prices would have to be substantially higher than the average price currently ruling. Making the comparison from another point of view, the return on investment in the two works most recently constructed by members had been less than 10 per cent. On the basis of this evidence, the court accepted the contention that the scheme had resulted in lower prices in the past. It should be pointed out, however, that this evidence is not logically conclusive.

The theoretical proposition on which the comparison is based is that in an expanding industry the long-run price must be sufficient to give an adequate reward to new investment. Long-run price should be interpreted to mean the average of the prices [2] over the life of the investment, in this case of the order of thirty years. A firm requiring 15 per cent. return would not necessarily be deterred from building new plant, and initially charging low prices, if it thought that prices would rise in the future to bring the long-run price to a satisfactory level. And it might very well take the view that prices would rise if, as was agreed by the parties and accepted by the court, demand is expected to expand in the future. A similar qualification is relevant to the calculation of the rate of return which the industry has required from new investment in the past. The rate of return may have been 10 per cent. for the first ten years of a plant's life, but this is quite consistent with the requirement

[1] *Re Cement Makers' Federation's Agreement* [1961] 2 All E.R. 75; (1961) L.R. 2 R.P. 241.

[2] Future prices should, of course, be appropriately discounted.

and expectation of a return of (say) 15 per cent. if the expected rate of return over the subsequent twenty years is around 18 to 20 per cent.

Although the court accepted that in the past the scheme had resulted in lower prices, it pointed out that this was relevant only in so far as it indicated the way the scheme would be operated in the future. The court had to predict the future level of prices on two alternative assumptions. On the first assumption, that the scheme were allowed to continue, the court believed that the industry would continue to be content with a return of under 10 per cent. on new investment and to charge low prices.[3] Secondly, assuming the scheme were ended, the court implied that the firms would raise prices to yield the competitive rate of return of 15 per cent. (p. 91 H).

Although the consequences of the first assumption were discussed in some detail the judgment has little to say in justification of its conclusions about the results of ending the agreement. The court accepted " . . . that [the members of the Federation] have felt able to do this [charge low prices] because of the added security of their investment afforded by the common price agreement and that, without that security, they would have required and could have obtained a higher return of the order of 15 per cent." (p. 90 D). Now if it could be argued that the scheme in fact gave negligible additional security, it would follow that the scheme was not *necessary* to secure the lower prices—at least, not on the grounds presented in the judgment.

The cement industry bears some standard characteristics of a risky industry. The plant is long lived, so that firms embarking on new investment must predict conditions of demand and supply far into the future. In the short run, a high proportion of total cost is fixed, and in times of low demand prices could fall far below total cost in a highly competitive industry. Demand is liable to wide fluctuations for the industry and even more so for the individual works.

For the purpose of examining the necessity for a risk premium on new investment in the cement industry in the absence of the agreement, it is convenient to distinguish between long- and short-run fluctuations in demand. If, in the long run, demand is less than expected and the average price received for the product is low, a heavy loss may be made on the initial investment in the plant. But this risk is ruled out by assumption in the judgment. It was agreed by both parties and accepted by the court that demand would continue to rise at a rate of some $3\frac{1}{2}$ to 4 per cent. per annum and that supply would keep in step with demand except for short periods in some places (p. 89). Moreover, once it is admitted that

[3] The court made some recommendations to, and accepted assurances from, the Federation which are discussed at the end of this note.

long-run demand might decline then a bulwark of the Federation's argument falls to the ground—for it is only when new capacity must be installed that the competitive price must give the competitive rate of return. A secular fall in demand might cause prices to fall to such an extent as to yield a negative rate of return in competitive conditions. In these circumstances the scheme would operate to prevent buyers reaping the benefits of the sellers' over-optimistic predictions of future demand. This detriment was not considered in the judgment. We can conclude that to explain the necessity for a risk premium on the grounds that long-run demand might fall is inconsistent with the main reasoning of the judgment.

Now let us assume that the forecast of long-run demand is held with confidence, but that short-run demand is subject to random fluctuations (which average out over the life of the plant to the predicted level). In these circumstances we can conceive of two reasons why firms should require a higher minimum rate of return under free competition than they would under the scheme. The first is simply that they prefer a steady income to a fluctuating stream with the same average value. But large, well-established firms are able to dampen the effects of fluctuations by building up, and drawing down, reserves; and it seems unlikely that they would be prepared to accept a substantial cut in their minimum return on capital merely for a more even distribution of the same income over time. The second reason for requiring a risk premium is appropriate in the case of a firm which is financially weak. A firm may view with confidence long-run prospects in an industry and yet be deterred from building costly long-lived plant. If demand is subject to short-run fluctuations, it is possible that, if demand in the first few years is very poor, the firm may be unable to meet its obligations and be forced into bankruptcy. In this case the firm will require to be tempted by a higher rate of return before it will court the possibility of a disaster before it has had time to build up reserves. It appears unlikely that the firms in the cement industry possess the characteristics to need a substantial risk premium because short-run demand is liable to fluctuations.

Nor does it seem that, even if short-run demand fluctuates, profits need fluctuate widely. When discussing the *average level* of prices the court compared the effects of the scheme with " free competition." At that stage, it did not describe in detail the nature of the competition which could be expected in the absence of the scheme. However, the court elaborated its expectations when it came to discuss the *geographical structure* of prices. " The industry is dominated by APCM. . . . It is the natural price leader in the industry. . . . It would be in a strong position in any price war with one of the other companies " (p. 91). Thus, in the absence of the scheme, it seems likely that APCM could, if it wished, exert a powerful influence to stabilise profits.

It is a pity that the judgment does not discuss more fully the

necessity of a risk premium in the cement industry if the scheme were abandoned. For it appears that it might be difficult to explain the necessity for a risk premium on grounds which are consistent with some of the fundamental propositions which underpin the judgment, unless it were contended that the firms were financially weak. If one accepts the proposition that the abrogation of the agreement would not increase risk, there is no obvious reason why prices should be higher.[4]

The effects of the basing point system [5] have long exercised the minds of American businessmen, economists and lawyers. It would have been interesting if the judgment had provided an extended analysis of the effects of the system. The court was satisfied that transport costs were kept low and that there was no serious distortion of the pattern of location of users of cement. One gets the impression that the court found the arguments against the basing point system advanced by the Registrar lacking in sharpness when compared to the argument and evidence supporting the contention that the scheme as a whole [6] resulted in a lower average price; moreover the magnitude of the reduction in average price might have seemed to outweigh any detriments to the public, even if the Registrar's arguments had been conceded.

The basing point system was operated so as to give a transport subsidy to more distant buyers [7] in comparison with those located nearer cement work. This implies that for any given average level of prices the buyers near cement works paid higher prices than they would if charges for transport more nearly reflected the true cost of

[4] In the *Black Bolt and Nut* case, the court seemed to take the view that a similarly oligopolistic industry would price with restraint in the absence of a restrictive agreement: L.R. 2 R.P. at p. 91.

[5] The "basing point system" is a method of calculating delivered prices. In this case a base price is fixed for each work or adjacent group of works. Concentric circles are drawn round each base which delimit zones within which the delivered price is the same to all customers. The delivered prices rise as the zones get farther away from the base, until the zone intersects a similar price zone from another basing point. Thus the whole country is covered by price zones within any one of which the delivered price is identical no matter from where, in fact, the cement is transported.

[6] The judgment does not discuss whether or not the basing point system was an *essential* feature of the price restriction scheme. The main benefit received by buyers was argued to be the lower prices which resulted from the elimination of risk through the reduction of competition. Other forms of restrictive agreements might have had the same effects.

[7] In an addendum to the Monopoly Commission Report, Mr. Hill and Sir Arnold Plant contended that subsidising outlying areas was against the public interest in that it restricts the possibility of specialised local competition. The Monopolies and Restrictive Practices Commission: *Report on the Supply of Certain Industrial and Medical Gases*, p. 106. Professor G. C. Allen criticised the use of a uniform delivered price system in the fertiliser industry on the grounds that it led to ". . . a distortion in the present pattern of production and costs, and the uneconomic use of resources. . . ." The basing point system is similar to a uniform delivered price system in that prices charged to customers do not reflect the true costs of supplying them. The Monopolies and Restrictive Practices Commission: *Report on the Supply of Chemical Fertilisers*, pp. 229–230.

transport. Thus the court had to balance this detriment to a section of the public against the benefit secured by the lower average level of prices. The court found that, because of the nature of competition to be expected in a highly concentrated industry, there was no strong presumption that, if the scheme were abrogated, prices would more nearly reflect transport costs. Moreover, a conservative estimate of the price rise under free competition was more than double the highest estimate of the transport subsidy included in the ex works price. Thus it seemed that even buyers located near cement works would be worse off if the scheme were abrogated.

The court considered a number of subsidiary restrictions associated with the agreement, of which the two most interesting were the aggregated rebates to large purchasers and the requirement that prices charged should be those ruling on the date of delivery. Rebates were granted to large customers based on their total purchases of cement from all members of the Federation during the course of the year. The court found that this restriction had no economic justification and had the positive disadvantage of discouraging firms from leaving the Federation and inhibiting the entry of independent producers. This restriction was declared void.

The second restriction prohibited members from entering into long-run contracts at a fixed price. The court found this reasonably necessary for the maintenance of the main restriction since otherwise " . . . it would be a simple matter for individual members, by entering into long-term contracts at a fixed price, to evade and so nullify the effects of a price agreement based on the current costs of the industry plus a reasonable margin of profit " (p. 95). It is unfortunate that the court does not elaborate this point because it is difficult to see the force of the argument. That prices received should be based upon *current* costs plus a reasonable profit margin does not seem an essential and sacrosant feature of the justification of the scheme. The Federation's argument was that long-run prices would be lower if restricted competition enabled the members to be satisfied with a lower return on capital. Thus long-term contracts at a fixed price would only be inconsistent with the scheme if they led to increased risk by encouraging more competition. It would not seem impossible to inhibit the use of this weapon of competition by special provisions for fixed price contracts—for example, by requiring that the price should be that ruling at the date of the contract. Thus the admitted advantages to buyers of fixed price contracts might be secured without facilitating an increase in competition.

Although the court found that the industry had operated the scheme to the advantage of buyers in the past, and believed that the present members would continue to operate it with restraint, it nevertheless felt that, taking the long view, additional safeguards

were needed. The industry had in the past been advised on production costs by an independent committee. The court felt that this committee exerted an " influence [which], while not mandatory, has been effective in exercising a wise control over prices. . . ." The industry undertook to make specific provision within the scheme for the continuance of the committee. In addition, the court made some recommendations as to additional information which should be submitted to the committee by members of the Federation.

Should the Federation change its price policy with regard to method or profitability, this " . . . would be a material change in relevant circumstances entitling the Registrar to apply to the court under section 22 of the Act " (p. 93). The Federation offered an assurance that, if requested, it would supply the Registrar with " such information relative to prices and costs as is in the possession of the Independent Costs Committee for the purpose of enabling him to decide whether he should make an application under section 22 " [8] (p. 93). Thus the result is that so long as the industry wishes to continue the scheme it must submit to a form of price control, although one may question whether the Registrar is an ideal instrument for maintaining a watch on an industry's prices. Although one might dispute the logic of the judgment, the result seems to be that the scheme will benefit buyers as long as demand continues to expand. It is interesting to ask whether, if the long-term trend in demand turned downwards, this would constitute a change in relevant circumstances enabling the Registrar to make an application under section 22, for we have argued that the assumption of expanding demand underlies the judgment. If the Registrar applied and was successful, we would have the paradoxical situation that, in the only circumstances in which the industry really needed the scheme, they were denied its benefits.

J. R. GOULD.

REWRITING CONTRACTS AND THE COURT OF APPEAL

IN 1955 the defendant in *Alder* v. *Moore* [1] was a professional footballer playing for West Ham when, in the course of a game of football, he suffered a serious injury to his right eye. He was, however, a member of the Association Football Players' and Trainers' Union, and he was insured under a Lloyd's policy taken out by the Union on behalf of its members. Under that policy, he was paid £500 by underwriters in respect of permanent total disablement; but he was required under the policy to give, and

[8] In the *Black Bolt and Nut* case the question of an application under s. 22 by the Registrar was discussed: [1960] 3 All E.R. at p. 142; L.R. 2 R.P. at p. 102. However, in that case no similar assurance to provide information was given.

[1] [1961] 2 W.L.R. 426; [1961] 1 All E.R. 1.

duly signed, a personal undertaking, the material part of which (as rectified by agreement) read as follows:

> " In consideration of the above payment I hereby declare and agree that I will take no part as a playing member of any form of professional football in the future and that in the event of infringement of this condition I will be subject to a penalty of the amount stated above " [*i.e.*, £500].

Within four months of receiving this sum of £500 the defendant, who was no longer a member of the Union, once again began regularly to play professional football, this time for a minor club, Cambridge United. Upon discovering this the underwriters (through a representative) brought this action to recover the sum of £500 from the defendant under his undertaking. The Court of Appeal (Sellers L.J. and Slade J., Devlin L.J. dissenting) held, reversing Paull J., that the underwriters were entitled to recover.

Four principal arguments were advanced by the defendant why the underwriters' claim should not succeed:

(1) The undertaking provided that the defendant would take no part as a playing *member* of any form of professional football in the future. These words exactly reflected the words in clause 8 of the policy, which made provision for the giving of the undertaking; and in the policy the word " member " was defined as " a person of the male sex who was registered with the Union as a member of the Union." It was accordingly argued for the defendant that, since he was no longer a member of the Union (*i.e.*, the Association Football Players' and Trainers' Union) when he played for Cambridge United, he had not broken his undertaking by taking part as a playing *member* of any form of professional football. This argument was, however, rejected by the Court of Appeal. Sellers L.J.,[2] relying on the fact that the words " playing member " were not together in the policy except in clause 8, held that in that setting they clearly had no reference to membership of the Union. Devlin L.J.[3] pointed out that the term " a playing member of any form of professional football " was ungrammatical, ill-chosen and obscure and he, like Paull J., thought it was best interpreted as " a member of a team playing professional football." In view of this obscurity it is, perhaps, not altogether surprising that this argument was rejected, but it is submitted that there was a good deal to be said in its favour. It is always a strong step to reject a definition provided in a contractual document. If the word " member " is not here given its defined meaning, it appears to have little or no meaning in the undertaking as given; the word " player " might equally well be substituted for the words " playing member." Moreover it is, with respect to Sellers L.J., difficult to see why, in the undertaking, the words " playing member "

2 *Ibid.* at p. 430.
3 *Ibid.* at p. 434.

should " clearly have no reference to membership of the Union." It would be necessary to distinguish a member of the Union who was a player from a member of the Union who was, for example, a trainer; and good sense can be made of the undertaking in that, if the defendant resumed professional football as a playing member of the Union, the underwriters would be continuing to provide cover for him although they had already paid him £500 for his permanent total disablement.

(2) The defendant's second argument, which was linked with his first, was that in view of the doubtful meaning of the undertaking the *contra proferentem* rule should be invoked against the underwriters to prevent them from enforcing the undertaking in the way in which they sought to do. It was this argument which had appealed to Paull J. in the court below and upon which he had based his judgment for the defendant. It was, however, rejected by Sellers L.J. (and presumably also by Slade J.) on the grounds that the *contra proferentem* rule could not " defeat the clear meaning of the words." [4] Such a rejection was, it is submitted, remarkable in view of the obscure wording of the undertaking. It is, perhaps, not surprising to find that Devlin L.J. was sympathetic towards this argument, though he based his dissenting judgment, as we shall see, on a different ground. He would, however, have relied upon what he called " a rule of construction rather wider than the *contra proferentem*." He said [5]:

> " This undertaking and the clause from which it springs are most unusual impositions to put upon an assured. Insurance policies are concerned with events; insurers either pay or do not pay the sum assured according to whether or not the event has happened; they do not normally exact undertakings from the assured about his future behaviour once he has got the money. The money that they pay out under a policy of this sort is obviously intended to be spent as soon as the assured gets it, it will be his only support while he is looking for another means of livelihood. I think that it can be strongly argued that if underwriters want to get the money back again on the happening of a certain event, they must define the event in clear and unambiguous terms so that the assured can know exactly what he can and cannot do. If they do not do that, they cannot rely upon the promise at all. . . ."

There is, it is respectfully submitted, very considerable force in this approach, though it is not easy to see in what respects this " wider rule of construction " differs from the *contra proferentem* rule.

(3) The judgments are, however, principally concerned with the defendant's third argument, namely, that the undertaking was a penal provision and, as such, unenforceable by the underwriters.

[4] *Ibid.* at pp. 430–431.
[5] *Ibid.* at pp. 434–435.

In the court below Paull J. took the view that the sum claimed was not a penalty, but we are not told upon what grounds he reached this conclusion. In the Court of Appeal, Slade J. held that the undertaking imposed no contractual obligation upon the defendant not to play professional football; it was, he considered, simply making provision for the repayment of the sum of £500 in a certain event, *i.e.*, if the defendant resumed playing professional football, and so, there being no breach of contract, the question of a penalty did not arise. With all respect, it is very difficult to reconcile this view with the actual words of the undertaking. Devlin L.J. thought that the language was, in this respect, " as plain as a pike-staff " and that it contained a promise by the defendant not to play professional football again. Indeed, it is hard to imagine how a contractual undertaking could be more clearly imposed than by the words " In consideration of so-and-so, I hereby declare and agree so-and-so."

Sellers L.J. held that the sum claimed was not a penalty because, as in *Re Apex Supply Co., Ltd.*,[6] there was nothing " unconscionable or unjust and therefore unenforceable to be found." [7] In the *Apex* case, Simonds J. held that no question of penalty versus liquidated damages arose, because he was concerned with a contract for the payment of a certain sum in a certain event and, that event having happened, the sum became payable. In the present case, however, unless Slade J.'s construction of the undertaking was accepted (and Sellers L.J. does not appear expressly to have accepted it), the situation differed from that in the *Apex* case in that the only event upon which the sum of £500 became payable was the breach by the defendant of his undertaking not to play professional football. Accordingly Devlin L.J., relying upon a passage in the dissenting judgment of Jenkins L.J. in *Cooden Engineering Co., Ltd.* v. *Stanford*,[8] considered that the question of penalty versus liquidated damages did here arise; and, since he further took the view that there was no evidence that any damage to the underwriters flowed from the defendant's breach, he held that the sum claimed by the underwriters was a penalty and irrecoverable in law. It did not assist the underwriters that they might not have been acting unconscionably in this particular case; the meaning and effect of the clause had to be considered as at the date of the contract and not at the date of the breach and, tested in the light of its potentialities, it could be used extremely harshly.

It is submitted that on this point, too, the dissenting judgment of Devlin L.J. is to be preferred. No doubt the majority of the court were striving to reach a conclusion consistent with what they conceived to be the merits of the case. The merits were, however, not entirely on one side; before they made the payment, the underwriters had every opportunity to decide whether the defendant had

[6] [1942] Ch. 108.
[7] [1961] 2 W.L.R. 426 at p. 432.
[8] [1953] 1 Q.B. 86 at p. 109.

suffered permanent total disablement, but they were content to make the payment in a doubtful case, relying for their protection upon a clause which, if enforced in certain circumstances, could result in serious hardship to the defendant. It may well be that the underwriters could have protected themselves beyond dispute if they had used a different form of undertaking; indeed, we are told that they have already adopted a new form of words in undertakings of this kind. But is is difficult to see how the law, as hitherto accepted, could be held to permit the enforcement of the undertaking here used. We have been told again and again that the courts will not rewrite contracts for parties, and those who have to advise parties of their rights under contractual provisions appreciate to the full the practical advantages of this rule, for it is of the greatest importance that contracting parties should know where they stand. It is therefore not a little disturbing to find the Court of Appeal deciding a case upon a view of a contract which does not appear to accord with the words actually used.

(4) Finally, the defendant in his counter-notice took the point that his undertaking not to play professional football in future was unenforceable as being in restraint of trade. This argument was not pressed in the Court of Appeal, for no doubt good tactical reasons; but it is one which, if adumbrated, would have raised a number of difficult questions. Certainly, an undertaking given under a policy of insurance is a novel context in which to find a covenant in restraint of trade in the ordinary sense; moreover, especially in view of the provision for payment of the penalty of £500, it is doubtful whether the appropriate remedy for breach of the undertaking, if enforceable, would have been the ordinary remedy of injunction. This was therefore no ordinary covenant in restraint of trade and it was moreover one which, in its context, might have been held to be reasonable and so enforceable. The only reference made to the argument in the judgments was by Sellers L.J., who stated [9] that he did not know why the point was raised even on paper. Often, however, it is difficult to foresee how a case will develop on appeal and it is submitted, with respect, that this was a valid arguable point which, although it might not succeed, it was proper for a careful pleader to keep open in his counter-notice.

Robert Goff.

An Ingenious Concept of Effectiveness

Hunter v. *Hunter and Waddington* [1] affords an unusually nice illustration of that Holmesian maxim engraved in every conflict lawyer's heart—" the foundation of jurisdiction is physical power." [2]

9 [1961] 2 W.L.R. 426 at p. 433.
1 [1961] 2 W.L.R. 691; [1961] 2 All E.R. 121.
2 *McDonald* v. *Mabee* 37 Sup.Ct. 343 (1917).

A husband, who had a fortune of £20,000 and a gross annual earned income of £2,670, had recently divorced his wife on the ground of adultery and was applying to the court under section 24 (1) of the Matrimonial Causes Act, 1950,[3] for an order settling certain property of his wife upon the two children of their marriage, their independent means being virtually nil. Almost at once after the decree absolute, the wife had married a man who was domiciled in Kenya; at the time of the husband's application she was in fact resident there. The registrar reported in favour of a settlement comprising all the wife's property in England, *viz.*, a reversionary interest (in a fund of some £15,000 held by English trustees) under her father's will and her half share, valued at about £2,125, in the former matrimonial home, giving her a life interest in the former, but not in the latter. The wife, who also possessed some assets in Kenya and Australia, appeared under protest (and so did not submit to the jurisdiction) and objected on the grounds (a) that the court had no jurisdiction and (b) that, even if it had, more property than was reasonable was included in the proposed settlement. The husband sought confirmation of the report.

Basing himself upon *Tallack* v. *Tallack and Broekema*,[4] counsel for the wife argued that the wife's foreign domicile precluded jurisdiction. To borrow the words of Scarman J. " this is altogether too sweeping a proposition." [5] It was quite clear from the judgment of Lord Merrivale P. in that case that it was not the Dutch domicile and residence of the wife that stood in the way of his ordering a settlement but the facts that all her property was situated in Holland and that no effect would be given in Holland to any order that the English court might make. Having lost this point, counsel then urged that, despite the presence within the jurisdiction of the property belonging to the wife, no effectual order could be made because, finally, the order could only be enforced by personal coercion of the wife—and she was beyond the court's reach—and because it would amount to the infringement of the authority of the Kenya courts to seek to enforce it against her. Counsel for the husband maintained that the property could be effectively settled notwithstanding these objections. It may be mentioned that it had not been suggested that effect would be given to any order that the court might make by the Kenya courts.

[3] This reads: "If it appears to the court in any case in which the court pronounces a decree for divorce . . . by reason of the adultery . . . of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

[4] [1927] P. 211. In this case a husband sought a settlement under what is now s. 24 (1) of the 1950 Act of his former wife's property, she having remarried and become domiciled and resident in Holland and having no property within the English jurisdiction; Lord Merrivale P. refused to make any order on the ground that, if he did so, it would be " an idle and wholly ineffectual process."

[5] [1961] 2 W.L.R. at p. 693.

Counsel for the wife had suggested that the settlement could not be drafted because (which is true) section 24 contained no power to refer the matter to conveyancing counsel of the court and that to allow the husband or his advisers to draft the settlement would be contrary to principle. Even if he were wrong on this point, he submitted, the settlement when drafted could not be executed because section 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, could not apply to a settlement.[6] Scarman J. did not finally decide whether he had power to refer the matter of drafting the settlement to conveyancing counsel in the absence of an express power in section 24 [7] because he felt able to give directions for the preparation of the instrument he thought necessary. " The words of the section," he said, " seem to me conclusive upon the point: for the court, having power, ' if it thinks fit,' to order ' such settlement as it thinks reasonable,' must have power to give directions as to its drafting and finally to approve a submitted draft. The language is quite clear, requiring the court first to decide whether the case is a fit one for settlement and then to decide and order whatever settlement it considers reasonable." [8] In so far as it was urged that a draft submitted by the husband instead of by the wife, her advisers or conveyancing counsel of the court would be unjust, the learned judge pointed out that she would have " the safeguard of the court's approval of the draft before it was submitted for execution " [9] and that he could thus provide for the drafting of the settlement without resort to attachment proceedings.

Finally, there was the matter of the execution of the settlement. His lordship considered that the settlement envisaged by section 24 (1), like the one here proposed by the registrar, was an instrument transferring property to trustees to hold on certain trusts. As such, he considered, it would fall within the term " any conveyance, contract or other document " as used in section 47 of the 1925 Act. Since it had already been held [10] that the provisions of

6 This reads: " Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document . . . the High Court . . . may order that the conveyance, contract or other document shall be executed . . . by such person as the court may nominate for that purpose. . . ."

7 There is certainly difficulty in this context: *Style* v. *Style and Keiller* [1954] P. 209 (C.A.), relied on by counsel for the wife, did not settle the point, though it tends to negative the possibility of such reference. It is clear from the judgment of Scarman J., at pp. 695–696, that he thinks such reference is within the court's powers.

8 At p. 696.

9 *Ibid.* Presumably the husband or his advisers must have had all the documents necessary, and all other information, for the preparation of the deed, for, while the court has inherent power to order a respondent to lodge the necessary documents with conveyancing counsel of the court (see *Bartlett* v. *Bartlett* (1918) 34 T.L.R. 518), no order could have been made against the wife here inasmuch as she was abroad.

10 See *Re Cathcart* [1893] 1 Ch. 466 (C.A.); *Savage* v. *Norton* [1908] 1 Ch. 290 and, especially, *Howarth* v. *Howarth* (1886) 11 P.D. 68; *ibid.* 95 (C.A.). A writ of attachment may of course be obtained in appropriate cases, as in *Medley* v. *Medley* (1882) 7 P.D. 122 (C.A.).

this section can operate entirely independently of the power of attachment, he held himself able to order a person to execute the deed without concerning himself with the fact that he could not attach the wife on account of her refusal to consent to the drafting of the settlement. Thus, he concluded, he could make an effectual order and would vary the registrar's report by ordering, *inter alia*, a settlement of one-half the reversionary interest, subject to the wife's life interest therein, and of the whole of her interest in the matrimonial home, excluding any life interest therein.[11]

This reasoning appears, with respect, to be impeccable and certainly opens up new vistas of the principle of effectiveness.

P. R. H. Webb.

Infants' Contracts—La Nouvelle Vague?

In his recent paper on "Reform in the Law of Contract,"[1] Mr. Grunfeld remarked that litigation in the field of infants' contracts "has remained relatively dormant since the termination in 1914 of the golden era of the high-living Oxbridge undergraduate. But, the large sums of money of which teenagers now dispose and to which a large section of trade and industry has been attracted may give these problems of infants' capacity a sharper significance than was foreseeable before the war." The reason why the "teenager revolution" has not so far produced a rash of litigation is not far to seek. Although young people now dispose of large sums of money the primary outlet for spending it is on food and drink, clothes and the assorted products of the entertainment industry. In all these cases cash transactions predominate. This means that though the contract into which the infant enters may itself be void, it will usually be immediately followed by performance so that the infant's right to recover his money will usually be barred by the fact that he must show total failure of consideration.[2]

However such transactions do not account for the whole of teenage spending, which also spills over into the field of consumer durables, where hire-purchase is the normal method of finance. Some of the legal problems which can thus arise are illustrated by *Yeoman Credit Ltd.* v. *Latter*.[3] In this case the plaintiffs, a finance company, let a car on hire-purchase terms to the first defendant Latter, who was known to all the parties to be an infant. At the end of the hire-purchase agreement there was a form of guarantee and the words: "Note—if the hirer is under twenty-one an adult must sign a special form of indemnity." The second defendant

[11] For the full text of the variation, see [1961] 2 All E.R. at p. 128.

[1] (1961) 24 M.L.R. 62 at 84.

[2] *Valentini* v. *Canali* (1889) 24 Q.B.D. 166; *Pearce* v. *Brain* [1929] 2 K.B. 310. Mr. Treitel (1957) 73 L.Q.R. 194 at 202, argues that the rule is not so wide but it is thought that his argument on this point is adequately answered by Mr. Atiyah (1958) 74 L.Q.R. 97 at 102. Even on Mr. Treitel's view the infant's right to recover will often be lost in such cases.

[3] [1961] 1 W.L.R. 828; [1961] 2 All E.R. 294.

accordingly signed a second document headed "Hire-purchase Indemnity and Undertaking." The first defendant made the initial payment on the car but never paid any of the instalments and the plaintiffs repossessed the car in May 1959 and sold it. They claimed to recover £182 8s. from the second defendant under the indemnity.[4]

At the invitation of counsel, the county court judge decided a preliminary point of law [5] and held that the hire-purchase agreement was void under section 1 of the Infants Relief Act, 1874, and that the undertaking of the second defendant was a guarantee of a void contract and was therefore also void. The plaintiffs appealed to the Court of Appeal. It was admitted that the hire-purchase agreement was not a contract for necessaries and the Court of Appeal therefore had no difficulty in concluding that the county court judge was correct in holding that it was void.[6] They decided however that he was wrong to decide that the plaintiffs had no remedy against the second defendant.

This situation naturally calls to mind the decision of Oliver J. in *Coutts & Co.* v. *Browne-Lecky*.[7] It will be recalled that in that case the second and third defendants had guaranteed the overdraft of the first defendant, an infant, with the plaintiff bank, who knew of the first defendant's infancy. It was held that the infant's contract to repay the loan was void and therefore the guarantees given by the second and third defendants were void. That decision has been subjected to criticism on a number of grounds.

In the first place no account was taken of the predominant view that the words "absolutely void" in section 1 of the Infants Relief Act, 1874, are not to be taken at their face value and that infancy is to be treated as a "personal privilege." [8] The vexed question of the interpretation of these words has been sufficiently canvassed of late [9] and it is sufficient to note here that the Court of Appeal in the present case do not appear to have been invited to overrule this aspect of Oliver J.'s decision.

A second criticism of Oliver J.'s reasoning, which counsel did put forward in the present case, is that he was wrong to decide that there is a general rule that a guarantee of a void contract must itself of necessity be void. This decision was based on the decision of the House of Lords in *Swan* v. *Bank of Scotland*,[10] on appeal

4 They also sued the hirer as first defendant but they never served him and he took no part in the proceedings.

5 This course was criticised by Harman L.J. who said that this procedure was only useful where the preliminary point will decide the substantial question at issue between the parties [1961] 1 W.L.R. at 835; [1961] 2 All E.R. at 299.

6 This seems to be the first decision that the words "goods supplied" include a contract of hire-purchase. See Treitel (1957) 73 L.Q.R. 194 at 196–197.

7 [1947] K.B. 104.

8 See *Sutton and Shannon on Contracts*, 5th ed., pp. 115, 116, note (r); *Chitty on Contracts*, Vol. II, p. 448.

9 See Treitel (1957) 73 L.Q.R. 194 at 200–202, and *cf.* Atiyah (1957) 74 L.Q.R. 97 at 99–101. The authorities for the orthodox view are conveniently collected in (1957) 73 L.Q.R. 201, note 42.

10 (1836) 10 Bli (N.S.) 627.

from Scotland and on a statement by Pothier, as quoted in De Colyar's *Law of Guarantees*.[11] Mr. Cohn has shown, however, that there is much to be said for the other view.[12] It is clear that the version of the civil law upon which Oliver J. relied was misleading in that it failed to take account of the fact that both Roman law and most modern civil law systems regard a guarantee of a *naturalis obligatio* as binding. It would seem that there would be much to be said for inquiring why the law avoids the main contract rather than applying a rule of thumb that the guarantee falls with it. This might well promote a result more desirable in principle and it would not be without authority since against *Swan* v. *Bank of Scotland* may be set *Yorkshire Railway Wagon Co.* v. *Maclure* [13] and *Garrard* v. *James*,[14] where it was held that the directors of a company who have guaranteed an *ultra vires* debt of the company are liable on the guarantee.[15] It is true that Oliver J. expressed himself unable to understand the basis of these decisions but they have stood for some time and are generally accepted as good law. It is interesting to note that Leake cites them as authority for the proposition that "a guarantee of an illegal debt is illegal and void; but a guarantee of a debt which is merely void and not illegal . . . is valid." [16] *Rowlatt on Principal and Surety* [17] seems to take a similar view.

The Court of Appeal were able to avoid expressing any opinion on this vexed question as they were able to distinguish *Coutts & Co.* v. *Browne-Lecky* on the facts and hold that the present transaction involved not a guarantee but an indemnity. It was decided by the Court of Appeal in *Wauthier* v. *Wilson* [18] that the incapacity of the infant defendant would not avail his father, where the latter had joined as principal borrower.[19] In the present case the Court of Appeal were able to find ample material in the document signed by the second defendant and in the surrounding circumstances to justify classifying the transaction as an indemnity and not as a guarantee.[20] This approach deprives the case of a good deal of legal interest but several points still call for comment.

It is clear, first, that though *Coutts & Co.* v. *Browne-Lecky* has not been overruled, its practical importance is now minimal. It

11 3rd ed. at p. 210.
12 (1947) 10 M.L.R. 40; see also Else-Mitchell (1947) 63 L.Q.R. 255.
13 (1881) 19 Ch.D. 478.
14 [1925] 1 Ch. 616.
15 *Cf. Sutton and Shannon on Contracts*, 5th ed., p. 132.
16 *Contracts*, 8th ed., p. 598.
17 3rd ed., p. 168. *Cf. Pollock on Contracts*, 13th ed., p. 125.
18 (1912) 28 T.L.R. 239.
19 At first instance Pickford J. had treated the transaction as a guarantee and held it valid. The Court of Appeal taking a different view of the nature of the transaction did not express a decided view on the guarantee point, but it is fairly clear that they were very doubtful whether Pickford J.'s reasoning could be supported.
20 See especially the full consideration of the wording and effect of the document by Holroyd Pearce L.J. [1961] 1 W.L.R. at 831–833; [1961] 2 All E.R. at 296–298.

had already been suggested [21] that its effect could be avoided by using a form of words which suggested indemnity and not guarantee and any banks and hire-purchase finance companies which have not already adopted this suggestion will surely now do so.

Secondly, it must be noted that the distinction between guarantee and indemnity is one which evolved in relation to a completely different branch of the law, *viz.*, section 4 of the Statute of Frauds. The general principle behind the distinction is fairly clear and was stated by Davey L.J. in the leading case of *Guild & Co.* v. *Conrad* [22]: "In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not." Nevertheless the application of the distinction, as with most distinctions associated with the statute, has been attended with much barren ingenuity and hair-splitting.[23] It is surely legitimate therefore to regret that the distinction has been given fresh life.[24] Harman L.J. showed clearly that he regarded this distinction as gaining nothing in translation.[25]

Finally, attention may be directed to the method by which the court decided whether the transaction was one of guarantee or of indemnity. No doubt in the traditional but unhelpful formulation this is a question of the intention of the parties but what clues should be regarded as most significant? Two factors seem to stand out on the facts of the case. The first is that the document embodying the agreement between the plaintiffs and the second defendant differed considerably from the hire-purchase agreement in the obligations it purported to impose so that it could plausibly be regarded as an attempt to protect the plaintiffs against loss rather than to make good the infant's liability.[26]

Secondly, there was the fact that all the parties knew that the hire-purchase agreement could not be enforced against the infant defendant. This gave added force to the argument that the parties must have intended the second transaction to be independent of the validity of the first and both Holroyd Pearce and Harman L.JJ. laid stress on this.[27] This view would tend to support the suggestion

21 Chorley, *Law of Banking*, 4th ed., at p. 154; Holden, *Securities for Bankers' Advances*, 3rd ed., pp. 206–208.

22 [1894] 2 Q.B. 885 at 896.

23 See Williams, *Statute of Frauds*, Section IV, pp. 12–15; *Cheshire and Fifoot on Contract*, 5th ed., p. 154; Wilson, *Principles of the Law of Contract*, p. 82; Anson's *Law of Contract*, 21st ed., p. 67; *Salmond and Winfield on Contract*, pp. 127–129.

24 See Atiyah, *Introduction to the Law of Contract*, p. 83.

25 [1961] 1 W.L.R. at 835; [1961] 2 All E.R. at 299. It is worth noting that the distinction between guarantee and indemnity is nowhere expressly taken in the company cases, although in *Garrard* v. *James* at least there is a suggestion that the directors assumed a primary liability.

26 See [1961] 1 W.L.R. at 832; [1961] 2 All E.R. at 297 (Holroyd Pearce L.J.); [1961] 1 W.L.R. at 836; [1961] 2 All E.R. at 300 (Harman L.J.).

27 [1961] 1 W.L.R. at 833; [1961] 2 All E.R. at 298 (Holroyd Pearce L.J.); [1961] 1 W.L.R. at 835; [1961] 2 All E.R. at 299 (Harman L.J.).

that Oliver J. took a wrong view of the facts in *Coutts & Co.* v. *Browne-Lecky* and should have treated the transaction as an indemnity.[28] This line of argument has an insidious charm but it is not completely convincing since to say that the parties intend their transaction to be effective is not quite the same as to say that they intend to adopt one form rather than the other.[29] Yet knowledge clearly seems relevant and this tends to confirm the suspicion that the guarantee-indemnity distinction will prove a blind alley and that knowledge should be one of the factors in deciding whether a guarantor of an infant's contract should be liable. There is a clear distinction on the merits between a person who guarantees a contract which he believes to be binding on the principal debtor and one who knows that the principal debtor is not legally liable. Is it too much to hope that the law can take this into account? [30]

M. P. Furmston.

Complications of the Fundamental Term

The Court of Appeal continued their recent reappraisal of the modern common law of hire-purchase in *Yeoman Credit Ltd.* v. *Apps.*[1] This time the subject of the proceedings was an unusable car which was neither safe nor roadworthy when it was delivered to the hirer, although some minor defects, not affecting the working of the car, had been seen by the hirer before the hire-purchase agreement was signed. On discovering the state of the car the hirer did not immediately reject it: he complained but paid the first three instalments under the hire-purchase agreement, hoping that the dealer would contribute towards the estimated cost of putting the car into proper repair (about £100). When this did not happen the hirer refused to pay the fourth instalment and rejected the car. After two instalments had not been paid the finance company terminated the agreement, in accordance with its provisions, and had the car towed away, thus, in effect, recognising the uselessness of the car as a car. They then sued for arrears of instalments unpaid, to which claim the hirer counterclaimed, as money paid for a consideration that had failed, the deposit and the three instalments, totalling £170, paid by him to the finance company. One final fact must be noted. In the agreement it was provided that no warranty was given as to the age, state or quality of the car or as to fitness for any purpose, and any implied warranties and conditions were expressly excluded.

28 *Cheshire and Fifoot on Contract*, 5th ed., p. 343, note 2. *Cf. Sutton and Shannon on Contracts*, 5th ed., p. 132, where it seems to be suggested that knowledge of infancy has the opposite effect.

29 Davies L.J. was extremely doubtful whether any significance could be attached to the knowledge of the parties [1961] 1 W.L.R. at 837; [1961] 2 All E.R. at 300.

30 Some Continental systems make this distinction. See Cohn (1947) 10 M.L.R. 40 at 46.

1 [1961] 2 All E.R. 281; [1961] 3 W.L.R. 94.

Despite this denial or exclusion of any express warranty as to quality, the Court of Appeal found no difficulty in concluding that a breach of contract had taken place. It was held that in a contract of hire (and therefore of hire-purchase) there was an implied warranty, condition or undertaking that the thing hired was reasonably fit for the purpose for which it was hired, whether that purpose was expressly made known to the owner of the thing or impliedly known to him in the sense that he knew the ordinary use of the thing. Even though the warranties implied by the Hire-Purchase Act, 1938,[2] were inapplicable,[3] the common law protected the hirer, to the same extent, so it would appear. Why then was the legislation necessary? Only Davies L.J. attempted to solve this conundrum.[4] One answer he gave was that the matter was thus put beyond doubt by legislation. Where was the doubt? Admittedly, in *Robertson* v. *Amazon Tug and Lighterage Co.*[5] the point had been left undetermined. But there was a catena of authority before 1938 suggesting that in contracts of hire such a term as to fitness was implied.[6] The effect of the legislation, it is suggested, was to produce doubts, which have now been put to rest by this decision, about the implication of such a term into a contract of hire-purchase outside the scope of the statutes.

The second answer given by Davies L.J. is based on the distinction between statutory terms as to quality implied into hire-purchase contracts and fundamental conditions. Not every sort of unfitness would amount to a breach of the fundamental condition of such a contract: therefore it may have been thought necessary to enact that defects less than those which constituted a fundamental breach of the contract should give a right to the hirer in cases covered by the statutes.[7] Thus, according to Davies L.J., legislation was necessary to protect buyers on hire-purchase in the event of breaches of contract that were not fundamental enough to give them rights at common law. But if they had no rights at common law, does this not mean that at common law there were no implied terms as to quality? And if there were no such terms before 1938, why should there have been any after that date? It is respectfully suggested that these two answers are inconsistent.

Be that as it may, the second answer of Davies L.J. leads to the main point of the case. If the statutory implied terms are not fundamental conditions, then, on the argument submitted above, neither is the term as to fitness implied now, if not before 1938, by

2 s. 8 (1) (*d*), (2), implying conditions as to merchantable quality and fitness for the required purpose, if known to the owner.

3 Because the price of the car took the agreement outside the scope of the Hire-Purchase Acts, 1938–54.

4 [1961] 2 All E.R. 281 at p. 292.

5 (1881) 7 Q.B.D. 598.

6 *Sutton* v. *Temple* (1843) 12 M. & W. 52 at p. 60, *per* Lord Abinger; *Jones* v. *Page* (1867) 15 L.T. 619; *Hyman* v. *Nye* (1881) 6 Q.B.D. 685; *Mowbray* v. *Merryweather* [1895] 2 Q.B. 640; *Vogan* v. *Oulton* (1899) 81 L.T. 435.

7 [1961] 2 All E.R. 281 at p. 292.

the common law. Therefore, in the light of earlier authorities,[8] such terms may be excluded by appropriate words in the agreement, as they were by the agreement in this case. Hence no remedy would be available to the hirer unless he could show the breach of a fundamental condition. For it is clear that the operation of a fundamental condition cannot always be excluded by an agreement, which is only effective where the person entitled to the benefit of an exclusionary clause has performed his part of the contract.[9]

What was the fundamental condition in a contract of hire-purchase of a car? If it was the same as the implied term as to fitness, then it would be excluded by the agreement: if it was something more basic than that implied term, what was its content? What could be more basic or fundamental than that the car should have been reasonably fit for the purpose of use? The only clue to the answer is provided by Holroyd Pearce L.J. when he spoke of " an accumulation of defects which, taken singly, might well be within the exception clause, but which, taken *en masse*, constitute such a non-performance, or repudiation or breach going to the root of the contract, as disentitles a party to take refuge behind an exception clause intended to give protection only in regard to those breaches which are not inconsistent with and not destructive of the whole essence of the contract." [10] Thus, mere defects in repair, even though numerous, would not amount to breach of a fundamental condition of the contract. In the present case, however, there was " such a congeries of defects as to destroy the workable character of the machine." [11] Hence there had been a breach of a fundamental condition of the contract.

In view of the fact that the car did go after it had been delivered to the hirer, even though it went only at the rate of three to four miles in 1½ hours, it would seem that the vehicle was not as incapable of being described as a car as the vehicle in *Karsales (Harrow) Ltd.* v. *Wallis*.[12] It may have been a car not reasonably fit for the purpose of use as a car: but it was not something so incapable of such use as to be totally different from the thing bargained for. If the facts in this case showed a breach of fundamental condition, it is suggested that, in the interests of purchasers and hirers, the courts are introducing such subtle gradations between " ordinary " and " fundamental " conditions that no intelligible distinction will soon remain.

[8] *Ward* v. *Hobbs* (1878) 4 App.Cas. 13; *Wallis* v. *Pratt* [1911] A.C. 394; *Andrews* v. *Singer & Co.* [1934] 1 K.B. 17; *L'Estrange* v. *Graucob* [1934] 2 K.B. 394.

[9] *Pinnock Bros.* v. *Lewis & Peat Ltd.* [1923] 1 K.B. 690; *Alexander* v. *Railway Executive* [1951] 2 K.B. 882; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty Son & Co.* [1953] 2 All E.R. 1471; *J. Spurling Ltd.* v. *Bradshaw* [1956] 2 All E.R. 121; *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 2 All E.R. 866; *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] A.C. 576.

[10] [1961] 2 All E.R. 281 at pp. 289–290.

[11] *Ibid.*, quoting Lord Dunedin in *Pollock & Co.* v. *Macrae*, 1922 S.C.(H.L.) 192 at p. 200.

[12] [1956] 2 All E.R. 866.

Further confusion is introduced by the court's treatment of the hirer's claim that there had been a failure of consideration. One would have thought that if the vehicle were so different from a usable car as to put the owners in breach of a fundamental condition, they had not provided any consideration for the hirer's payment to them. However, lawful possession had been obtained of a car, the defects of which were remediable, at a cost. Moreover, the car was subsequently resold. These circumstances proved that the hirer had got substantially what he had bargained for, unlike the unfortunate, innocent purchaser in *Rowlands* v. *Divall*,[13] who got no title to the car he bought even though he had possession of it for some months.[14] Whereas acceptance of the car in that case did not prevent the purchaser from pleading failure of consideration, the failure by the hirer in this case to rescind the contract immediately did affect his claim that consideration had failed. The effect of this, therefore, seems to be to distinguish between the fundamental condition as to title in sale of goods [15] and the fundamental condition as to fitness or quality in hire-purchase.

All this makes the case difficult to assimilate into the existing corpus of authority on the subject of fundamental conditions. One can only suggest that the need to alleviate the situation created by the development of exemption or exclusionary clauses has led to the extension of a clear and workable common law idea until it has become indistinct and fraught with problems of definition and application. Perhaps the best way to deal with the whole matter would be to restrict the rights of parties to certain kinds of contracts (*e.g.*, sale, hire-purchase, hire, and other bailments) to exclude the operation of statutory or common law conditions.[16]

A final comment on the curious situation resulting in this case is provided by the decision on the subject of damages. The hirer was awarded £100, the cost of the repairs needed to the car, even though he did not in fact get those repairs done. The only reason would appear to be that, in view of his approbation of the contract by his keeping the car, his right to reject for breach of fundamental condition and claim for failure of consideration was treated as a right to sue for breach of warranty (just like the treatment of a buyer under Sale of Goods Act, 1893, s. 11 (1) (*c*)). This again involves the distinction of the facts in this case from those in *Rowlands* v. *Divall*, without there being any rational basis for distinction except the apparent difference between title to and quality of goods. Why such a distinction should be made and why damages were ever awarded are not the least puzzling features of a very hard, difficult case indeed.

G. H. L. FRIDMAN.

[13] [1923] 2 K.B. 500.
[14] [1961] 2 All E.R. 281 at p. 290, *per* Holroyd Pearce L.J.
[15] *Quaere* whether this is different from the implied statutory condition as to title.
[16] *Cf.* Hire-Purchase Act, 1938, s. 8 (3), where this has been done.

Rescue of Property

That a person who intervenes to rescue or protect property which has been endangered by the tortious act of another and who, in so doing, suffers injury may claim damages against that other, was decided in *Hyett* v. *Great Western Ry.*[1] approving the decision of the Second Division of the Court of Session in *Steel* v. *Glasgow Iron & Steel Co.*[2] Is there any limitation on this principle? Must the property rescued be that of the plaintiff or of the defendant or may it be that of a third party? The authorities are not clear on the point. *Steel's* case, it will be remembered, was one in which the guard of a goods train was fatally injured while attempting to minimise a collision between his train and some wagons belonging to the defenders which had run away owing to the negligence of the defenders' servant. Had the collision taken place with full impact the property of both the guard's employers—the L.M.S. Railway—and of the defenders would have suffered greater damage than it did. But the emphasis in the judgment of Lord Jamieson is on the fact that it was the guard's employers' property that was preserved. He said [3]: "I regard Steel's action as having been directed solely towards the preservation of his employers' property." The Lord Justice-Clerk did not advert directly to this point but said [4] that he attached great importance to the fact that the deceased [Steel] was the guard and not a stranger. It may consequently be said that the court intended the principle it laid down to be applicable when the property protected was that of a third party to whom the rescuer stood in a special relationship.

In *Hyett's* case, the plaintiff received injuries when he was attempting to put out a fire in a railway wagon belonging to the defendants in which the defendants' servants had negligently left a leaking tin of paraffin. Undoubtedly the property endangered was that of the defendants. But in the statement of facts it is stated that the wagon—a privately owned one—on which the plaintiff, who was employed by wagon repairers, was working was on the same sidings some twenty-two yards from the wagon in which the fire occurred. Tucker L.J. did not mention this fact in his judgment. But he did say that if a man sees a fire starting on those premises where he is working, whether or not the property of his employers is in immediate peril, he, as a reasonable man, will take the necessary steps to put out the fire.

Tucker L.J.'s words, coupled with the stated facts, are wide enough to cover the case where the property of both the defendant and the plaintiff's employers, for this purpose a third party, is endangered.

[1] [1948] 1 K.B. 348.
[2] 1944 S.C. 237.
[3] At p. 265.
[4] At p. 250.

In the recent New Zealand case of *McCabe* v. *Russell and Another* [5] Henry J. held that a plaintiff who has suffered injury was entitled to recover when the property protected was solely that of a third party to whom the plaintiff stood in no relationship other than that of being a member of a local Volunteer Fire Brigade.

The first defendant lit a fire on a sheep run which she occupied in the Middlemarch district of Otago. The learned judge held that, in lighting the fire as and when she did, the defendant was guilty of negligence. The fire got out of control and spread to other properties. In response to a call by, and under the general direction of, the local constable, a number of members of the local Volunteer Fire Brigade, of whom the plaintiff was one, attempted to beat out the fire. The plaintiff was trapped in the flames and badly burnt. At this place the fire had reached a point some six miles from the defendant's property. His Honour found as facts: (a) that the plaintiff volunteered as the result of the general body of neighbours, who were interested in preventing the further spreading of the fire into their properties, taking steps to get help. (b) If the fire had not been stopped by the steps taken it might have spread for many more miles. (c) There was no danger to life and limb, excepting to those fighting the fire, as everyone was forewarned, but there was danger to property and stock. At no stage, it appears, was there any danger to the plaintiff's own property.

The learned judge, adopting the tests of liability in such circumstances enunciated by Lord Jamieson in *Steel* v. *Glasgow Iron & Steel Co.*[6] held the defendants liable.

In *Hyett* v. *Great Western Ry.*[7] Tucker L.J. said [8]: "It is material to consider the relationship of the plaintiff who intervened in the matter to the property in peril or to the person in peril." There was a relationship to the property in *Steel's* case in that Steel was the guard of the train likely to be involved in the collision. There was such a relationship in *Hyett's* case in that Hyett was working on a wagon on the same siding as that on which the burning wagon stood and the wagon on which he was working might have been endangered by the spread of the fire. Henry J. has held in the instant case that there is such a relationship when the plaintiff acts as a member of a Volunteer Fire Brigade. But what of the case of the intervener who stands in no relationship to either the property protected or the person whose property is protected.

A negligently lights a fire. The fire spreads in the direction of and reaches A's stables. B, a passer-by on the highway, enters the stables and rescues the horses. In so doing he is badly burnt. Will B be denied recovery on the ground that he stood in no relationship either to A or to A's property? It is submitted that he should be

[5] [1961] N.Z.L.R. 385.
[6] *Supra.*
[7] *Supra.*
[8] At p. 348.

able to recover even though he might be classed as one of MacKinnon L.J.'s " officious bystanders," provided that, to quote the Lord Justice-Clerk in *Steel* v. *Glasgow Iron & Steel Co.*[9]: " his intervention, looked at as a whole, was reasonable and justifiable and a natural and probable consequence of the defender's negligence which ought reasonably to have been foreseen." The fact that he was a stranger to both the defendant and his property should not prejudice him.

A. G. Davis.

Post Hoc or Propter Hoc?

The relevant facts in *McWilliams* v. *Sir William Arrol & Co. Ltd. and Others* [1] are broadly similar to those in *Roberts* v. *Dorman Long & Co. Ltd.*[2] Both cases arose as the result of the deaths of steel erectors occasioned by falls of about seventy feet. In neither case was the deceased wearing a safety belt. The Building (Safety, Health and Welfare) Regulations, 1948, relevant in *Roberts'* case, required safety belts to be available, and the Factories Act, 1937, s. 26 (2), on which the action against the second defenders in *McWilliams'* case was based, required measures to be taken to ensure the workers' safety, and safety belts were the desirable measures in the circumstances. But in both it was established that steel erectors engaged in work such as that in which the deceased were employed do not normally wear safety belts. Indeed, in the Scottish case, the Lord Ordinary, Lord Guest (now a Lord of Appeal in Ordinary), was satisfied that " erectors find them cumbersome and regard them as a dangerous impediment." [3] One is tempted to ask, parenthetically, whether any practical workmen (as opposed to union officials) were consulted in drafting the 1948 Regulations. At any rate, the various defendants were found to be in breach of their respective common law or statutory duties.

It is here that the cases part company. Lord Goddard C.J. held in *Roberts'* case that, as the belts were not available, the deceased had had no opportunity of electing to use one. Accordingly, the plaintiff, having established a breach of duty causing or contributing to her husband's death, was entitled to recover, apparently in full, with no reduction for contributory negligence. His lordship stated [4]: " If a person who has to make an inquiry fails to do so, he cannot be heard to say: ' But even if I had, it would have led to no useful result.' So, I think that if a person is under a duty to provide safety belts or other appliances and fails to do so, he cannot be heard to say: ' Even if I had done so they would not have been worn '."

9 *Supra.*
1 1961 S.L.T. 265.
2 [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.
3 At p. 266.
4 At p. 946.

In coming to similar conclusions, Hodson L.J.[5] remarked that it could not " lie in the mouth " of the defendants to say that the absence of safety belts was not the cause of the accident.

On the other hand Lord Guest [6] held that it would " be totally unrealistic to hold that the failure to provide safety belts was the cause of the accident, when all the evidence points to the improbability that, even if they had been provided, they would have prevented the accident."

On a reclaiming motion to the Inner House, heard by the First Division, Lord Clyde [7] fully concurred with Lord Guest's remarks, and added: " It seems to me to be quite contrary to principle to hold the defenders to blame for this accident because they omitted to take what is shown to be a mere empty gesture." Lord Guthrie similarly held [8] that it was " obviously relevant to show that the provision of a belt would have had no practical effect, and would not have prevented the accident."

The opinions of the Scottish judges, who all rejected the dictum of Lord Goddard C.J., quoted above, as certainly not being a statement of the law of Scotland, demonstrate clearly the elementary principle of Aquilian liability that the damage suffered by the pursuer must flow from the defender's breach of duty.[9] Not every damage following every breach of duty, statutory or otherwise, gives rise to a claim against the delinquent. As Lord Reid indicated in *Wardlaw* v. *Bonnington Castings* [10] it is not sufficient to prove the mere possibility that the injury was caused by a breach of duty. In other words, *post hoc* must not be confused with *propter hoc*. Whatever may be the views of the reasonable man on his perennial journey in the Clapham omnibus, it is submitted that the " realistic man " on the Auchenshuggle tram would, as did the Lord President, prefer those of Lord Guest.

It may be noted that the former Lord Chief Justice's dictum has not met with universal approbation in England either. Recently, for example, in *Qualcast (Wolverhampton) Ltd.* v. *Haynes* [11] Lord Denning remarked [12]: " It is often said that a person who omits to do his duty ' cannot be heard to say ' that it would have made no difference even if he had done it: see *Roberts* v. *Dorman Long & Co. Ltd.* But this is an overstatement."

Phrases such as " cannot be heard to say," or " cannot lie in the mouth " (used also by Parker (now Lord Parker C.J.) and Denning (now Lord Denning) L.JJ. respectively in *Drummond* v. *British*

5 At p. 951.
6 At p. 266.
7 At p. 270.
8 At p. 273.
9 *Viz.*, *damnum injuria datum*. It is unnecessary to adopt Lord Chancellor Cairns' canine neo-Latinism, *incuria dans locum injuriae*, in *Metropolitan Ry. Co.* v. *Jackson* (1877) 3 App.Cas. 193 at p. 198.
10 1956 S.C.(H.L.) 26 at p. 31.
11 [1959] A.C. 743.
12 At p. 762.

Building Cleaners Ltd.[13]; another safety belt case) become incantations, fully divorced from logic, but accepted by all. One is reminded of the admiration of the populace for the Emperor's new clothes in Hans Andersen's fairy tale. It may be murmured, " This saying is not clothed with any logic at all ! " The incantation could ring with equal grandiloquence if it were rephrased to express a doctrine of estoppel with the opposite effect, in manner such as this: " If a workman (or body of workmen) should persist in a dangerous practice so as to lead realistic employers to conclude that on a balance of probabilities safety measures if provided will be ignored, he cannot be heard to say that these measures should have been supplied." The Romans expressed this more briefly by the phrase *volenti non fit injuria.*

The *Qualcast* case in fact demonstrates the unrealistic nature of the dictum. The plaintiff, an experienced moulder, had worn ordinary boots instead of the protective spats which (the learned county court judge found) he knew to be available for the asking, although he had not been ordered or advised to wear them. His feet and legs were injured by splashing molten metal. Subsequently, in an action claiming damages, based on an alleged failure by the defendants to provide a safe system of work and safe and proper plant and equipment, the county court judge erroneously felt himself to be bound by the authorities to hold the plaintiff entitled to succeed, although three-quarters to blame. The Court of Appeal refused unanimously to upset this decision but the House of Lords, by a majority, found in favour of the defendants.

The plaintiff recovered fully from his injuries, but apparently he did not learn a lesson from his accident, and continued to work as before. He was in the happy position of surviving his accident and being able to give evidence. Nevertheless he did not apparently have the common sense to adopt a safer method of working which would indicate to the court the unsatisfactory nature of that previously followed.

The tragedy of *Roberts'* and *McWilliams'* cases is that the victims of the accidents could not give evidence. That, however, is no reason why the court should fly in the face of all probabilities and assume that on the one fatal occasion the deceased, contrary to his own practice and that of his fellows, would have used the safety device which should have been provided. The realistic employer knows that, if he enforced some of the rules laid down by the statute, his employees will be likely to retaliate by " working to rule " or even by striking.

The words of Lord Atkin in *Harris* v. *Associated Portland Cement Manufacturers* [14] (a case under the Workmen's Compensation Act, 1925) are worthy of repetition today: " The peril which a

[13] [1954] 1 W.L.R. 1434; [1954] 3 All E.R. 507.
[14] [1939] A.C. 71 at p. 79.

workman encounters in the course of doing his work by doing it negligently is not a peril which he is obliged to encounter; in fact by his contract of service he is obliged not to encounter it; for it is an implied term that he should work with reasonable care." The decision in *McWilliams*' case is consonant with this view of the law, and, it is submitted, with the principles of Aquilian liability as understood by the law of Scotland. It is conceded that it is an unfortunate decision for the pursuer, but if Parliament wishes to make the employer every workman's insurer, it is free to do so. It is better that this be done by unequivocal statute than by judicial distortion of the common law.[15]

H. McN. Henderson.

15 It is to be regretted that the rubric in the *Scots Law Times* report is misleading.

REVIEWS

An Introduction to the Law of Contract. By P. S. Atiyah, M.A., B.C.L. [Oxford: at the Clarendon Press. 1961. xii and 246 pp. 18s. net.]

The *Clarendon Law Series* is now well under way. Mr. Atiyah's work is the second volume to appear in this collection. The book, so its author tells us, is primarily intended for two classes of readers: "law students beginning a course on Contract, and non-lawyers who would like to have some idea of what the law of contract is all about." Any assessment of its merits must therefore, in the first instance, be made with reference to the success which it achieves in attaining this professed object.

There is no doubt that this book constitutes a most stimulating and original discussion of the basic principles of the law of contract. Mr. Atiyah has a lively and interesting style which is frequently coupled with felicitous, if caustic, turns of phrase. For example, when writing of the topic of Mistake, he says that "a cynic might conclude that no teacher of the law of contract was worthy of the name unless he had produced at least one paper on the subject." (The past tense is due to Mr. Atiyah's disbelief in the present existence of a doctrine of Mistake.) Mr. Atiyah also has an acute eye for the more controversial aspects of the law. In a work intended for non-lawyers, however, this has proved to be something of a mixed blessing. Perhaps with too great a deference to reviewers, he frequently gives perplexing hints of controversies which must necessarily lie outside the lay reader's ken. One encounters such phrases as "although there are difficulties in the way of this conclusion" (p. 32), "it [the rule] was based on a number of different grounds, none of which is entirely convincing" (p. 38) and "ways of escape have been sought by academic lawyers, although their theories have not yet been put to the test in England" (p. 41). Such glimpses of the unknown, though significant to the lawyer, may tend to irritate, rather than to enlighten, the lay-reader. Again, Mr. Atiyah occasionally loses sight of the fact that lawyers' language may sound very much like jargon to the man in the street. Expressions such as *res perit domino*, *inter se* and estoppel (unexplained) may not be understood, or welcomed, by all. Mr. Atiyah's polemical approach to the subject, coupled with his desire to leave no controversy unturned, make some chapters (for example, the section on Infants in Chapter VII) rather too much for the layman. In short, your reviewer would not be inclined to recommend the book to "non-lawyers who would like to have some idea of what the law of contract is all about."

But this is not to suggest that the work is not eminently suitable as an introduction for "law students beginning a course on Contract." The student will certainly be stimulated by the thought that the subject offers him some scope for argument and dispute. He may even have begun to revel in legal terminology. The real peril of an introductory work is that it may simply be dull, and Mr. Atiyah's book is never dull. In particular, it is enlivened by Mr. Atiyah's attack on three important concepts in the law of contract.

The first is the notion that contractual rules are based on the intentions of the parties. Such a theory is variously described as being "of very little assistance" (p. 113), as "an elusive criterion" (p. 112) and as "a transparent fiction" (p. 7). Mr. Atiyah nails his flag to the mast of an objective test. This will be generally acceptable to most lawyers, but Mr. Atiyah perhaps goes too far when he states that *Bardell* v. *Pickwick* was "probably correct" (p. 4).

The result of that case is a salutary reminder that the objective approach is not without its dangers.

The second is the doctrine of freedom of contract. Mr. Atiyah is convinced that this plays little or no part in the modern law. A not inconsiderable portion of this book is devoted to the problem of the standard form contract and Mr. Atiyah cogently points out that contracts freely negotiated between individuals should no longer be regarded as typical. This is, of course, a most welcome break from the "Victorian" approach to the law of contract. The student's ideas are immediately placed in the right perspective. But is the doctrine merely "a shibboleth" (p. 3)? Again, Mr. Atiyah may have overstated his case. In any event, the doctrine still has some relevance where equitable defences such as duress and undue influence are concerned.

His third antipathy is the doctrine of mistake. Mr. Atiyah reserves for it his most bitter invective. We are told that "there is much to be said for the view that there is really no room for any such doctrine in English law" (p. 41). He bewails the decision in *Couturier* v. *Hastie* and its subsequent embodiment in section 6 of the Sale of Goods Act, 1893. In his view, cases of "mistake" are explicable in terms of offer and acceptance, failure of consideration or rules of construction. But, even supposing this to be true, there is no reason why these should not be conveniently grouped together since there must be proof of a mistake, or at least of a change of circumstances outside the contemplated risk, before any legal consequences result. Mr. Atiyah has fortunately freed himself from his former adherence to the implied term theory of mistake, although, like Galileo, his recantation is somewhat half-hearted, since he now toys (p. 131) with the idea of an implied condition precedent. Yet support for an implied term theory in mistake can scarcely be reconciled with his attack on the "intention of the parties" and on the implied term theory of frustration.

Such personal views make for interesting reading. It is necessary, however, to take issue with Mr. Atiyah on one or two points. A better example might have been found of illegality which renders a sale unenforceable than that of a sale of a car in such a condition that its use on the road would constitute an offence under the Road Traffic Acts (p. 150). Section 68 (5) of the Road Traffic Act, 1960, expressly enacts that this is not to affect the validity of a contract or of any rights arising under a contract. Mr. Atiyah follows Williston in rejecting an intent to affect legal relations as a positive requirement of the formation of a contract (p. 50), but does not entirely justify the alternative requirement that the promise should be "seriously meant" and that there should be an intention to be bound. It is by no means certain that the defence of *non est factum* can be classed as a case "where there has never been any semblance of a proper offer and acceptance" (p. 106), especially since it does not depend on proof of knowledge or fraud by the other party. Nor is it certain that the sellers in *Cundy* v. *Lindsay* could have sued the rogue Blenkarn on the contract of sale (p. 47), although they might have had an action for damages for deceit. The fiduciary relationship between parent and child does not necessarily cease when the child marries or attains the age of twenty-one years (p. 165), and it is perhaps misleading to speak of the relationship of principal and agent as a fiduciary one when dealing with cases of undue influence (*ibid.*). Finally, it is by no means clear that Mr. Atiyah's suggested emendation of the Law Reform (Frustrated Contracts) Act, 1943 (p. 220), would be of advantage to a just distribution of losses. There is no reason why the "buyer" should bear all the loss in a situation similar to that in *Appleby* v. *Myers* where no actual benefit has accrued to him.

The book is written in a lucid and readable prose, and there are very few misprints or mistakes. When the book goes to its second edition Mr. Atiyah will no doubt correct the reference to *Percival, Ltd.* v. *L.C.C. Asylums* to (1918) 87 L.J.K.B. 677 and that of *Hughes* v. *Metropolitan Ry.* to (1877) 2 App.Cas. 439. Mis-spellings occur in *Derry* v. *Peak* (p. 159) and in the Inheritance (Family Provisions) Act, 1938 (p. 182). At the time Mr. Atiyah

went to press the Road Traffic Act, 1930, had become the Road Traffic Act, 1960, and the Railway Passenger Charges Scheme, 1952, had become that of 1959 (p. 109).

It is hoped that these few criticisms will not appear to detract from the merits of an extremely interesting book. Mr. Atiyah is to be congratulated on the service which he has performed in producing a very stimulating and useful introduction to one of the most difficult branches of the common law.

A. G. Guest.

Legal Theory. Fourth edition. By W. Friedmann. [London: Stevens & Sons, Ltd. 1960. xx and 564 pp. (with indices). £2 5s. net.]

Legal Theory has always been a controversial book. Montrose reviewed Friedmann and his reviewers at length (5 *Journal of Public Law* 418). Earlier editions were criticised for their brief accounts of writers and theories. This is still a feature of *Legal Theory*. Montrose wrote: "a student's book does well if it does no more than point the way to an author." But this is not a student's book; and the index of authors occupies four pages. Doctrines are still repeated without explanation, *e.g.* (p. 150): ". . . values are the higher the less they increase by quantitative extension and decrease by division. This again distinguishes spiritual from material values." *Legal Theory* was also criticised for its lack of form—for being two books in one. Friedmann has tried to repair this. He writes: "The work is now divided into three major sections. The first, putting together general reflections on the plan and function of legal theory incorporates two chapters formerly presented at the end of the book, but more appropriately treated in this context (*Legal Theory and Social Evolution* and *The Principal Antinomies of Legal Theory*) . . . Of the other two major sections of the book, the first remains . . . a critical survey of legal theories, while the second is a discussion of the function of legal theory in the approach to contemporary problems." Friedmann's own views are collected in Chapter 26 of the present work—and in *Law in a Changing Society*. Contemporary English analytical jurisprudence, Scandinavian realism, and modern "value philosophies" of law are given serious consideration in this edition.

If the arguments were always clearly expressed it would not matter whether *Legal Theory* were one book or fifty. But too often Friedmann is more enthusiastic than convincing. A term like "Conservatism," for example, should not be used as though it has a readily discoverable meaning of general application. Friedmann can also be uncritical in his praise of the judiciary. Is Lord Denning a sociological jurist? How did he know in *Green's* case that "there is no such separate class as the working class" (p. 20)? Again, why has Friedmann selected the dicta used in the section on *Theory, Policy and Evolution*? Are they examples—and if so, how representative? Or are they rules of some sort? Another reason for the intellectual insecurity many will feel in reading *Legal Theory* is the copious use of foreign illustrations. It is all very well to "bridge the gap between Continental and Anglo-American legal theories" (though this hyphen should deceive only the beginner). We are on fairly firm ground on this side of the Channel. Ministers, judges, civil servants—we know their names and habits. They are real; so are trusts and limited companies and capital punishment. But the Treuhand, the Procurator-General of the U.S.S.R., the Reichsgericht: what are they? Until we know what they really are they remain words on a page, coins in Friedmann's currency. We cannot say yea or nay to Friedmann on these topics: he is dealing at a fairly high level of abstraction from a pack that we cannot look at. This lessens the utility of *Legal Theory* as a tract for the times.

Personally, the reviewer is suspicious of two types of contemporary jurisprudence. The Oxford Movement may be in danger of ignoring the peculiar

factors in cases in their search for more general logical features—a bad basis for prediction. Too much is also written, and read I suppose, about the Task of the Lawyer. But Friedmann is quite right to insist that the power and the glory of the law are of this world—where the lawyer can save or lose his soul. In this his book is rare and valuable.

D. J. Bentley.

Principles of Local Government Law. By Sir Ivor Jennings. Fourth edition. By J. A. G. Griffith, ll.m. [London: University of London Press, Ltd. 1960. xxii and 316 pp. 18s. net.]

The third edition of this book appeared in 1947, and now Sir Ivor Jennings has joined the ranks of distinguished authors who, while busy preparing new books, persuade others to re-edit their older works. The task of editing on this occasion has been accomplished by Professor Griffith. As was to be expected, the passage of such major measures as the Housing Act, 1957, and the Local Government Act, 1958, and many important smaller Acts, such as the Rating and Valuation (Miscellaneous Provisions) Act, 1955, necessitated a great deal of change in the substance of the book; and though the historical part is much as it was before, the remainder has been greatly and expertly altered. The result is a clear and up-to-date account of the principles of local government law, published at a very moderate price. Anyone wanting to know the principles of the organisation of local government, of public health, housing, finance, judicial control, the powers of local government authorities in relation to planning matters, or the relations between these authorities and the state, can do no better than start his search for knowledge with this book. Of course the publication was too early to allow for the inclusion of any reference to the Public Bodies (Admission to Meetings) Act, 1960, or the Corporate Bodies' Contracts Act, 1960, for the preface was written in October 1959.

There is very little which can or ought to be criticised adversely, but there are one or two oddities which might have escaped the editor's finely-meshed net. On p. 144 *Lord* Coke appears. The account of *Board of Education* v. *Rice* on pp. 154–155 seems to imply that the House of Lords decided the case in favour of the Board. On p. 113 the adherence of members of local government authorities to political parties is favoured as being more likely to lead to strong policy. This is probably true, but the text is a bit hard on independent members, whose policies are described as tending to be "an amalgam produced by cliques and coteries." The reviewer knows personally many "independents" in various councils, and a high proportion are genuinely trying to further the public interest, while at the same time feeling that it is mistaken and irrelevant to introduce party politics into local government. There is much in favour of this view, and it would be possible for "independents" to feel that council members adhering to political parties are themselves merely forming cliques and coteries. One is left with the feeling that perhaps the writer dislikes "independents" because they are anti-Labour, but do not wish to call themselves Conservatives! The same page of the book contains the following curious statement about party control of local councils: "Nor is an occasional transfer of power wholly undesirable." Surely the knowledge of *when* (not just *if ever*) to ring the changes is part of the genius of the British electorate in local as well as national elections. In any case these matters are political rather than legal, and should not be overstated in a legal textbook.

Perhaps one aspect of the general purpose of the book may be commented upon. On p. 5 it is said that "The local government of London is in most respects peculiar and is therefore for the most part ignored in this book. . . ." In fact there are occasional isolated references to local government in London throughout the volume, but on the whole the declared self-denial is adhered to.

It may perhaps be questioned whether the principles of local government law in England and Wales can be adequately stated while largely ignoring some "peculiar" local authorities, which are nevertheless in fact some of the most powerful in the land. Similarly, there is very little more than a brief mention of town clerks and other clerks in connection with other officials, at pp. 130–135. In a law book of this kind, is not some account of their functions desirable? This is of course a problem of policy for the author or editor, and granted the actual policy decided upon the book is an excellent and welcome achievement.

D. C. M. Yardley.

A History of Lay Judges. By John P. Dawson [Harvard University Press. London: Oxford University Press. 1960. x and 310 pp. 52s. net.]

This penetrating and illuminating inquiry into lay participation in the administration of justice is an examination of the history of the survival of lay judges in England, in contrast to their displacement by professionals in Rome, France and Germany. In his search for an explanation of the contrast between the unique English experience and that elsewhere, Professor Dawson concludes that political factors probably account for the differences. Here we meet his major paradox—that the strength of the English monarchy allowed it to rely on amateurs, while the weakness of the French and German monarchies gave rise to bureaucracies. The learned author, believing that local self-adjudication led to local self-government adds the further paradox, that it was the greater power of the English Crown that led to self-government in England. Yet another paradox is that legal professionalism occurred earlier in England than in France or Germany and yet made more room for laymen in the administration of justice.

The political and social environments in the respective countries thus explain the professionalisation of adjudication abroad and the continued reliance on laymen in England. The means by which the respective solutions were reached were, in Professor Dawson's view, purely a matter of procedure. It is his major thesis that the adoption of canonist procedure abroad made professionalism inevitable, while the procedural compromise (reliance on the group inquest) accepted in England by 1300 fixed the supreme role to be played in our system by laymen. The vital question why England chose the group inquest rather than the obviously superior canonical methods of inquiry into the truth is answered in a simple and disarming manner: we had no choice. Lack of sufficient personnel to work any other system meant that the government had to use laymen, in order to economise judicial (and, indeed, administrative) time.

Professor Dawson opens with a short chapter on the ancient world, pointing to the Greek arbitration by laymen and to the Roman paradox that, although in the first (and crucial) five hundred years of Roman law there was no professional judge, yet the legacy of Roman law to Europe contains the notion of the judge as essentially a trained professional. In Europe, legal history opens with the laymen to the fore: all law-worthy men had to attend the folk-moot, and the *scabini* (law-finders) were the judges. Nor did the feudalisation of French law mean that the disappearance of the laymen was inevitable: their disappearance comes from the adoption of canonist modes of proof under which a bureaucracy drove the laymen out. In Germany, the *scabini* survived (as *Schöffen*) until the sixteenth century (the "free" *Schöffen* being "a respectable Ku Klux Klan") and are driven out, as in France, as a result of the adoption of canonist procedure. In contrast, in England, the laymen have remained. Professor Dawson first examines our royal courts. His accounts of the common law courts and of the justices of the peace follow tradition, though the latter leads to another paradox, that "the English respect for law is still

partly due to the important share that laymen still have in administering it." When he comes to the Chancery, however, Professor Dawson departs from the traditional view that one of its outstanding characteristics was its dependence on the main elements of Roman-canonist procedure. If this were so, it would follow from his thesis that (as in France and elsewhere) it would have led to the disappearance of the laymen. But Professor Dawson is at pains to emphasise the fact that the Chancery relied on laymen, first as examiners and investigators, and then as court-sponsored arbitrators. Indeed, the Chancery professionals could not otherwise have run their court and when they abandoned their early reliance on laymen the final calamities of the eighteenth century inevitably overtook them. On these issues, perhaps the evidence yet available is not decisive, but the thesis is an attractive one which might lead some researcher to a more detailed study of the early Chancery procedure.

It is, however, in the local courts that the laymen really come into their own, in Professor Dawson's view. Here, the suitors were the judges, while the stewards had executive power. For the bulk of the population, these courts dealt with what mattered most—day to day crime presented by juries and tenures dealt with according to local customs as declared by neighbours. Professor Dawson claims that "the ancient processes of community decision were channelled into the form of jury verdicts" and that even serfs felt a right to be tried by their peers, though his evidence on the latter point (an unsuccessful peasants' revolt) seems slight. In this part of the work, the author relies on a detailed survey of the manor of Redgrave, but he has disarmed any criticism that this is out of proportion with the rest of the work, by confession and avoidance, on the grounds that the treatment of these courts has hitherto been inadequate and (more modestly) that "for an American they have been an exciting discovery." His evidence of the supersession of the powers of lords and stewards by those of the neighbourhood juries may be a discovery which is still to be shared by many brought up in the tradition that the affairs of the English population were settled by writs.

This fascinating comparative study has the merit not only of seeking an explanation of the divergence of the English and continental legal systems, but of demonstrating the effects of this divergence upon the respective systems of government. Reliance on laymen in the process of adjudication is part of the pattern of self-government—and this, Professor Dawson believes, is shown above all in the growth of self-government in the courts of the Manors.

J. A. Coutts.

A Preface to Scots Law. Third edition. By Andrew Dewar Gibb, Q.C., LL.D., Advocate, and of Gray's Inn, Barrister-at-Law; lately Regius Professor of Law in the University of Glasgow. [Edinburgh: W. Green & Son, Ltd. 1961. xii and 165 pp. 12s. 6d. net.]

This book, originally published in 1944, was based on lectures given by Professor Gibb in 1941 to members of the Polish Forces then stationed in Scotland, and to them the book is dedicated. It has considerable value as a short and non-technical survey of the main features, institutions and doctrines of Scots law, including a condensed yet readable and informative account of a vast number of topics in brief compass, and as such it deserves to be better known furth of Scotland, where its study would dispel some of the abysmal ignorance which too frequently afflicts lawyers and laymen. It elucidates many of the complexities of Scottish terminology such as "poinding" and "vitious intromitter," which baffle some Scotsmen also. The publishers deserve credit for having produced this edition in pocket size and paper back format so as to make it available to the widest potential circle of readers, and it is to be hoped that this enterprise will be adequately rewarded.

The learned author is a stout defender of Scots law as an independent

system, and in the Foreword to this edition he attacks those who have recently argued for the assimilation of Scottish to English law, and throughout he trenchantly criticises some of the less satisfactory developments of recent years. So too his views on penology are not a conventional panegyric: "the Criminal Justice (Scotland) Act, 1949, . . . appears to be a sort of amalgam of contemporary speculative fads in the field of penology. . . . Too much leniency has been substituted for excessive severity as a corrupting influence on our youth, and its results are today deplorably apparent." Again his views on diminished responsibility are possibly rather harsh; he criticises it as very illogical and "a blot on our criminal law. . . . The strange rule, however, has recently been introduced into the law of England." The system indeed works admirably to circumvent the difficulty of the fixed penalty for murder, but the terminology is at fault; instead of "diminished responsibility" we should possibly speak of "diminished liability" or even "liability to diminished punishment by reason of weakness of mind."

While in general revision has been made throughout to take account of legislative and other changes since original publication, a few passages have escaped correction. The phrase "In happier times need will have . . . to be paid . . ." (p. 14) is redolent of 1941 and does not seem entirely appropriate twenty years later. On pages 77 and 155 respectively a "recent change in the law" and "recent legislation" are referred to in respect of statutes of 1929 and 1936 respectively; can these really be called "recent"? Ministerial responsibility for the appointment of J.P.s in Scotland was transferred from the Lord Chancellor to the Secretary of State for Scotland in 1955 (p. 7). The local government franchise depends on residence, and only if not resident, on ownership or occupation of heritage of a yearly value of not less than £10 (p. 13). Also on local government a mention of the Local Government (Scotland) Act, 1947, would have been desirable, and mention of the Franks Committee and the Council on Tribunals might have been made at the appropriate place (pp. 9–10). On p. 26 the Innkeepers Liability Act, 1863, is cited, though this has been repealed by the Hotel Proprietors Act, 1956. Under the Restrictive Trade Practices Act, 1956 (p. 101), it is not the case that restrictive agreements "found to be contrary to the public interest are rendered void." By section 21 they are deemed to be contrary to the public interest; the onus is to show that the restriction is not contrary to the public interest. At p. 147 the law as to insanity as a defence to a criminal charge is stated in words very reminiscent of the McNaghten Rules, though these were not accepted as Scots law in the evidence to the Royal Commission on Capital Punishment and were rejected in *H.M. Advocate* v. *Kidd*, 1960 S.L.T. 82. The Mental Deficiency (Scotland) Act, 1913 (p. 148), was repealed by the Mental Health (Scotland) Act, 1960.

The bibliography is doubtless designedly brief, but even so seems rather inadequate; there might surely have been a mention of Volumes 1 and 20 of the Stair Society Publications, which are goldmines on the history of Scots law, and of Professor T. B. Smith's volume on Scotland in the British Commonwealth Series; Renton and Brown's work is on Criminal Procedure not on Criminal Law; Burns' *Handbook of Conveyancing* is not in its second but its fifth edition, and Walton's *Husband and Wife* in its third, not second, edition; while such books at Dobie's *Sheriff Court Practice*, *Goudy on Bankruptcy* and *Gloag and Irvine on Rights in Security* might have been thought worthy of inclusion.

These criticisms should not be allowed to obscure the great merit of this book in giving a lucid and plain account of the common law on a scale which will daunt neither the layman nor the lawyer who wishes to cure the totality of his ignorance of Scots law. This function the book performs admirably.

David M. Walker.

THE ENGLISH LEGAL SYSTEM. Third edition. By A. K. R. KIRALFY, Reader in Law at King's College, London. [London: Sweet & Maxwell, Ltd. 1960. xxxi and 396 and (index) 11 pp. 42s.]

A BOOK first published in 1954 reaches its third edition in six years. Such a book has so clearly established itself that criticism which might in 1954 have worn the aspect of attempted infanticide can now be treated as a mere petty assault. It is, therefore, in acknowledgment of the fact that Kiralfy's *Legal System* is an established textbook that this review seeks to call in question some of its essential features.

There is a number of books bearing the title "The Legal System" or an equivalent phrase. They differ considerably in their content and in their mode of approach. Most of them are evidently designed for that type of course which figures so frequently in the first-year syllabus of university law schools. Indeed, the first edition of the book under review contained a preface which stated that it had been expressly designed for students taking the London University Intermediate LL.B.

To write a good elementary book for first-year law students requires considerable skill, and especially is this so in a book on the legal system. First, the author must decide what "the legal system" means to him. Is it the system of courts? Or the system of courts and procedure? Or shall a certain amount of substantive law be supplied as well? Secondly, the author must decide how much he is to descend to detail: to clog the young student's mind with minor points is even worse than presenting him with a skeleton so bare that it is like all other skeletons—devoid of life. Thirdly, the author must make up his mind what his approach is going to be. Shall he describe the modern legal system as he finds it, explaining by reference to historical development only where necessary? Or shall he unfold a tale of growth from small beginnings to demonstrate the evolution of the whole as well as of its several parts? Fourthly, the author must remember that the young law student, unlike his arts and science counterparts, has entered freshly on a subject which is replete with technical terms quite unknown among "les lays gentz." For a young man just entered in a law school to find himself suddenly confronted with disseisins, traverses, franchises, praecipes and so on is a truly alarming experience, and it behoves the author at every turn to ensure that initiation into the technical jargon of the law is gradual and accompanied with all necessary explanations. And, lastly, the text must have a style which makes for easy reading.

How does Kiralfy's portrait of the English legal system measure up to these suggested canons?

The author has clearly decided to paint courts, procedure and substantive law, and, furthermore, to get in as much detail as he can. As the canvas for this portrait is less than 400 pages it requires great dexterity to get the proportions right, and it must be said straightaway that to allot half as many pages again to procedure as are given to the courts and substantive law combined seems a major fault. That procedure absorbs so much space is because the author has descended to minute detail. Five pages for procedure at coroners' inquests and nine and a half pages for procedure at courts-martial seem very generous for a first-year student's book, and it is doubtful whether readers of this type need to be initiated into the mysteries relating to the drafting of pleadings in the Queen's Bench Division.

On the issue of an historical approach versus a descriptive approach Dr. Kiralfy has compromised. After a preliminary discussion of the nature of law and the general characteristics of the English legal system and a chapter on the Divisions of English Law we come to a chapter on the History of Substantive Law (with strangely little mention of the development of land law). Then, after an intermission on Sources of Law, we have a chapter on the History of the Courts. Inevitably this sort of approach leads to a certain

amount of duplication: thus, the origins of equity are touched on under Divisions of English Law, History of Substantive Law and History of the Courts. Every lawyer who writes outside a very narrow field has come up against the embarrassment caused by "the seamless web." Probably the best approach, at least for beginners, is one on strictly historical lines.

Then there are the technicalities which confuse the beginners. Quite early in the book we come across such things as eyres, and nisi prius and subpoenas. It is no business of the author to mystify young readers who cannot be expected always to read with a dictionary at their elbow.

And lastly there is the question of style. Style is often something so personal to the writer that it is almost indecent to criticise it, but reviewers of earlier editions of this book have commented on Dr. Kiralfy's short staccato sentences. Indeed, Dr. Kiralfy seems to have a particular animus directed against conjunctions and dependent clauses. A sentence with a too involved construction can need so much sorting out that the reader is confused: on the other hand a barrage of abrupt sentences does not make for fluent and easy reading.

None of the above criticisms must detract from the overall value of this book. It is, as has been said, an established book, and Dr. Kiralfy has many years before him in which to re-edit and improve it.

F. H. Newark.

THE QUANTUM OF DAMAGES. Vol. 1. Second edition. By David and Margaret Kemp. [London: Sweet & Maxwell, Ltd. 1961. xxxv and 743 pp. (with index). £3 3s. net.]

I find myself in what Mr. and Mrs. Kemp would probably consider an unorthodox position. Having been supplied with a review copy, I now possess the second edition of Volume 1 of their book on the *Quantum of Damages*, but I do not possess and never have possessed a copy of the first edition. In this abstinence I am not alone. Many practitioners in the field of personal injury claims have come to regard *Kemp and Kemp* as an indispensable tool of their trade, but quite a lot of others have been content (if the phrase is permissible) to remain utterly unkempt. However, the former class is evidently a large one, for the reception accorded by the profession to the first edition has provoked the second at an enhanced price.

The essential difference, I suppose, is between those who resort to encyclopaedias and those who do not. My own feeling has always been that if you have to thumb through an encyclopaedia (*e.g.*, the *English and Empire Digest*) in order to find support for some proposition which you wish to advance the proposition is probably not worth advancing; but this is perhaps not a fair comment when the point at issue is such an inscrutable mixture of law and fact as the cash value of a tennis elbow or an aortic aneurism. The Kemps at any rate are indefatigable encyclopaedists, and whether or not we belong to the same school we can all agree with Lord Birkett's statement (in the foreword to the first edition) that "the enterprise and industry of the authors are most praiseworthy." There can be no doubt on either of these heads. The range of their enterprise extends from the Westminster County Court to the Liverpool Court of Passage and from Glamorgan to Durham at High Court level. Their industry is attested by a table of cases containing the references to more than a thousand awards. It is obvious that mere effluxion of time adds copious grist to the encyclopaedic mill and if the awards made in the last seven years are all to be added to those noted in the first edition the second edition must be very substantially larger unless counter-measures are taken. They have been; a number of sections which appeared in the first edition on particular subjects such as the decline in value of the £ sterling and the rates of National Insurance benefit have now been omitted to make room for new material. Moreover, the reports of some cases which were previously given at length have been shortened and one frequently finds (*e.g.*, at pp. 71 and 200) references back to the first edition for fuller information. Hence the necessity

for the Kemp-minded practitioner to possess both editions; and the authors make it plain in the preface that when future editions appear subscribers will be expected to have all previous editions handy.

In justification of the encyclopaedic method the authors submit (p. 5) "that the correct approach to the assessment of damages in personal injury claims can be summarised thus: . . . In so far as the injury results in damage which does not admit of assessment by arithmetical calculation, the plaintiff should be awarded fair and reasonable compensation, such compensation to be assessed in the light of previous awards in respect of comparable damage."

With this may be contrasted the pronouncement of Parker L.J. (as he then was) in *Waldon* v. *War Office*, which is quoted at p. 107: that "each case depends upon its own facts and only rarely can another case be of real assistance to the judge." In this case the Court of Appeal examined the logical implications of the Kemps' approach, *viz.* (to quote Parker L.J. again): "that counsel on either side will come armed in every case of personal injuries with reports or transcripts in regard to other cases." Their lordships deprecated this idea as casting an undue burden upon judges and ruled that the judge in each case must retain a discretion to decide whether he will receive such material or not. At the same time the court made it clear that, for reasons which are not easy to pinpoint, such material is not admissible before a jury. Finally, Singleton L.J. remarked in the same case ([1956] 1 W.L.R. at p. 56) on "the desire which everyone has had for years to get as near as one can towards some form of scale or regularity in assessing damages."

Once one arranges these propositions in what appears to be their logical order, *viz.*:

(a) that there should be some sort of scale or standard;

(b) that each case is different from every other;

(c) that some judges may think (and are at liberty to think) that awards in other cases are apt to be helpful; and

(d) that other judges may think (and are at liberty to think) the contrary;

it becomes apparent that they are largely irreconcilable with one another and one wonders whether it is correct to assume that a judge is a better tribunal to assess damages than a jury. Some eminent authorities (see p. 708) refuse to make this assumption, but one of its principal champions is Lord Justice Devlin. In his highly instructive Hamlyn Lectures on *Trial by Jury* (Stevens, 1956, at p. 144) he supports it on the ground that "If a case belongs to a type, it is obvious that the result of the trial can be predicted with much greater confidence if it is taken before a judge alone than before a jury." Having a high regard for the jury and an innate distrust of the obvious, I have tried to test this proposition by reference to *Kemp and Kemp*. Between pp. 149 and 694 will be found the records of 132 awards made by judges sitting alone which were subsequently taken to the Court of Appeal. In exactly 50 per cent. of them the Court of Appeal varied the judges' awards, and of the 50 per cent. left untouched there are a number in which the Court of Appeal thought the awards to be too high or too low but felt unable to say that they were "wholly erroneous estimates" or, as the authors put it (p. 712), "hopelessly wrong." One of these (p. 499) was an award by Devlin J. of £2,000 in a case where the defendants had paid £2,500 into court. It is difficult after perusing these cases to feel much confidence in the theory of predictability, though one thing that can be predicted with confidence is that the award of a jury is less likely to be upset than the award of a judge, since the Court of Appeal has not the same power to upset it. Such indeed is judicial unpredictability that the Kemps have thought it worth while to include as Appendix C at p. 701 a sort of form book in which the Queen's Bench judges are listed alphabetically opposite to the prices they have quoted for various types of injury.

It is important, of course, to distinguish the erroneous from the wholly erroneous (*i.e.*, the wrong from the hopelessly wrong) and here the authors have done us a good service with their "Rough Guiding Rules" for would-be

appellants at pp. 115–117, which show at seven different levels of award about how wrong the figure has got to be before, on current form, the Court of Appeal is likely to interfere with it. The margins, of course, have to be fairly wide, and it is worth remarking that the wider they are required to be the farther one gets from establishing any sort of regular tariff for injuries of the same sort. This raises the question whether it is really right to try to establish one, and in this connection the case of *Vollans* v. *Rock*, as reported in *The Times* of May 18, 1961, is disquieting. This was a case where a woman "had lost one leg and for all practical purposes the second leg" and "had submitted to some thirty operations with a great deal of consequent pain and suffering." Streatfeild J. had awarded her £12,500 general damages. "Sellers L.J. said . . . The trouble was that the court had to relate damages awarded by the judge who had seen the plaintiff to those current in similar cases. Their Lordships had been referred to the unreported case of *Damms* v. *Hamilton* where the court had reduced an award of £13,000 to £9,000 in the case of an 18-year-old boy who lost both legs and had a £1 loss of weekly earnings. Although comparisons were not of arbitrary effect his lordship thought that in this case damages should be reduced to £10,000. Harman L.J., agreeing, said that the sum by which the damages were reduced was a sacrifice on the altars of conformity. Pearson L.J. agreed." It is to be hoped that this does not mean that there is no longer any room in the Court of Appeal for non-conformists.

Not all of the book (only about 550 pages) is occupied by what I have called the encyclopaedia. Part I, extending to p. 120, deals with questions of principle and contains much that will be of value to any practitioner whether he is of the encyclopaedic school or not. Chapter 3, for instance, on the incidence of tax and the rule in *Gourley's* case alerts one to a number of points which might otherwise be overlooked. It is supplemented by Appendix E which emphasises the difficulties arising from *Gourley's* case and suggests a solution which already has some authority behind it. Chapter 8, on "Miscellaneous Points of Law," is a most useful collection of dicta on all sorts of subjects. This is just the kind of material which one is constantly needing in practice but is unable to find at the moment when it is needed. Chapter 9 contains the "Rough Guiding Rules" to which I have already alluded. These are only a few of the matters mentioned in Part I which will be of real service to practitioners of any temperament. Indeed, my only disappointment in Part I occurred at p. 41. Imagine a plaintiff who suffers an injury of such a kind that his future earning capacity is reduced for the rest of his life by £2 per week. He is forty-five years of age, and, assuming that he might have gone on working till he was sixty-five, he has therefore lost about £100 per year for twenty years. What is the present value of this prospective loss? This problem, generally with much less tidy figures, turns up over and over again in practice and I was delighted to find that on p. 41 the Kemps provide a formula for solving it, *viz.*: $P = \frac{N(1+r)^n - 1}{r(1+r)^n}$ where P = present value, N = annual payment, n = number of years, and r = percentage rate. I do not suppose that raising (1 + r) to the nth power is anybody's favourite indoor sport. All the same, I should like someone else to try it because I cannot make this formula work at all.

C. P. Harvey.

Freedom of Speech in the West: a Comparative Study of Public Law in France, the United States and Germany. By Frede Castberg. [Oslo: at the University Press; London: George Allen & Unwin, Ltd. 1960. xiii and 475 pp. (with index). 35s. net.]

In this important book the eminent professor of Constitutional and International Law at Oslo, and former rector of the university there, provides us

with a detailed and fascinating study of the rules relating to freedom of speech laid down in the constitutions of three of the leading states in the Western world, and of the way they have been administered in practice. At first sight the result is a little discouraging, and certainly supports the contentions of the realists who maintain that you cannot secure civil liberties in a state by simply enacting laws in their support. Nevertheless there is much in the book which gives ground for qualified optimism, and certainly Professor Castberg in the masterly and inspiring paragraphs with which he concludes his work does not find future prospects altogether forbidding.

The scheme of the book is to deal with each of the three countries separately. There is very little "toing and froing," the reader being left to make his own comparisons, except that in the concluding chapter there are some overall reflections of a general character. A detailed rule-for-rule comparison would clearly have lengthened what is already a substantial treatise, yet personally I would have gladly sacrificed some of the detail which is often distinctly peripheral in order to get some more of the author's personal reflections on the efficiency of the methods used for safeguarding civil liberties in the countries concerned. Professor Castberg is not only a distinguished academic lawyer, but has been legal adviser in the Norwegian Foreign Office, and has played a prominent part in the League of Nations and the United Nations. He thus brings great practical experience of politics and a wide knowledge of international affairs to reinforce the value of his analysis. He is of course conscious of the extensive repercussions which civil liberties have throughout society and of the magnitude of the task involved in following these up, even if only in their essential aspects. He has nevertheless chosen to limit his investigation to the legal and political fields in which his own experience has been greatest: his purpose has been primarily "to give an account of where the national organs, judicial doctrine, and, first and foremost, the courts have stood."

It is not clear why Professor Castberg leads off with France, since not only is the American constitution older, but the American arrangements for safeguarding liberty are more elaborate and have been more successful. In France, of course, the ideology of the revolution of 1789 was primarily libertarian, and it is not without significance that "liberté" is placed first in the great trinity of human rights which fired the revolutionaries. Yet it is a commonplace that even at the height of the revolution much of the worship of the goddess "Liberté" amounted to little more than lip service, and that when the tumult had died down, and the dust had settled, France was left in the nineteenth century with a substantial block of anti-libertarian sentiment which the passage of years has reinforced rather than eroded away.

What is most significant in Professor Castberg's treatment of the Declaration of Rights of 1789 is the importance of the foreign elements which he finds in it: the philosophy of Locke, the experience of the Americans, of which some leading revolutionaries such as Lafayette had personal knowledge.

The nineteenth century was on the whole an age of liberalism, and the historical account which Professor Castberg gives of the vicissitudes of liberty in France since 1789 show that it was not in that century that it was in the greatest danger. Freedom of speech is a civil liberty which is particularly susceptible to the cry "la patrie est en danger" and this has rung out most persistently during the twentieth century, and is at its most insidious during a period of semi-civil war such as that now going on in Algeria. Professor Castberg considers that "the fate of political freedom of expression in the France of today is very uncertain." He regards General de Gaulle as one guarantee of it, but even more important in his view is the fact "that there always seem to be in France many people for whom freedom and democracy are values to be believed in, and for which they are prepared to fight."

On the constitutional side, Professor Castberg finds that administrative justice has on the whole provided the best safeguard for the rights of the

individual. Attacks on liberty tend to come from officials, particularly from the police, and it is these that the administrative courts exist to check. He quotes a German proverb to the effect that while "constitutional law passes, administrative law endures," and feels that the changes of 1958 tend to confirm this.

Among the topics which receive particular attention in the chapter on France are the control of the Press, the recruitment of the civil service, and the limitation on freedom of expression for civil servants which is even at the present time not apparently very serious, and the general problem of the loyalty of civil servants, always important in a country with a large Communist Party. In this chapter too there are some valuable reflections on the ideology of natural law and democracy leading up to a discussion of "freedom, too, to oppose freedom" which is continued in the final chapter of the book. Professor Castberg belongs on the whole to the school of natural law, though he is not a fanatical adherent, and recognises the value of the contributions made by the positivists.

The chapter on freedom of speech in the U.S.A. is much the longest of the three although it is concerned only with the federal constitution. The historical survey with which the chapter opens begins with Jefferson and the declaration of 1776. Although there is again some reference to Locke, the earlier struggles in England, of which such an historian as G. M. Trevelyan regarded the American struggle for independence as but a natural and inevitable consequence, are ignored. Indeed, the main weakness of Professor Castberg's book lies in his failure to evaluate the importance of the English experience in the development of liberty in the three countries with which he is concerned. Subject to this comment, the historical survey is masterly, and in it attention is focused, and rightly so, on the almost revolutionary change of front which masked the policy of the Supreme Court in 1937. What happened then is not easy to fit in with the author's predilection for natural law, but while he is very much alive to the difficulty, he makes no real effort to solve it.

Professor Castberg, who is naturally well aware of the political significance of the Supreme Court in the U.S. constitution, finds that the justices have been and are particularly sensitive to attacks on freedom of speech, and "apply severe standards to legislation, especially state legislation" which deals with that subject. Although on the whole the majority of the court "has not wanted to go further than considering the states bound by those provisions in the first amendment which represent the absolute minimum conditions for a nation where the rule of law shall obtain," there can be no doubt that in the peculiar circumstances of modern American history the Supreme Court has been much the strongest, if not the only effective, bulwark of freedom of speech. In economic and indeed in social matters generally it has been much less ready to intervene, particularly in recent times.

Professor Castberg's analysis of the American situation though on conventional lines is of a penetrating character and brings out clearly the essential elements in the situation. In making it he tends to stray a good deal beyond the realm of freedom of speech, indeed even more widely than he did in his discussion of the French experience, for he deals with many matters in the field of civil liberties generally, such as the passport question, the revocation of naturalisation certificates, the obligation to pledge allegiance to the flag, the excesses committed in the prosecutions of Communists, etc. Whilst the emphasis is no doubt on freedom of speech, which is indeed at the very core of civil liberty, the general treatment is of freedom under the constitution of the U.S.A.

Professor Castberg pays a tribute to the independence of the Supreme Court which has been maintained "against the wrath of large and powerful interests," though he quotes Justice Jackson's remark that "in civil liberties cases the court needs the support of an enlightened and vigorous public opinion." He illustrates this independence at a time when feeling against

Communism has been running high from three cases in which decisions against Communists have been struck down because of the unsatisfactory character of the evidence for the prosecution.

In spite of its political importance, Professor Castberg rejects the view that the Supreme Court is essentially "a legislative and political body." He considers that both the job and the method of work have been and always will be essentially "different in character from those of the legislator," and he supports this view both on theoretical grounds and from a consideration of the actual work of the court. This chapter finishes with the pertinent remark, "much has been said, through the years, for and against the Supreme Court of the United States. But I doubt whether anyone has claimed that it is a boring institution."

In two somewhat technical chapters Professor Castberg analyses the post-war legislation in the U.S.A. which deals with what are regarded as anti-social forces and particularly, of course, the Communist Party. He is especially concerned with the executive orders made under this legislation and the administrative provisions for carrying these out. The political pressure and the bureaucratic efficiency which have been brought to bear here are probably unique, certainly nothing of the kind has been seen in Western Europe. This has involved serious encroachments on freedom of speech and other civil liberties which the court have not been altogether successful in resisting.

In a final section which is of particular interest Professor Castberg discusses the problem of enforced conformance in the universities. In his view "it is a characteristic feature of post-war America that force of opinion and group pressure have resulted in creating, during a recent period, a conformance in American thinking to which one can probably find no parallel in the Western world"—this is a strong statement when one considers Nazi pressure in Germany. The pressure for conformance has naturally been strong in schools and in universities because it is there that opinion is made. In the universities, however, there has been a harder core of resistance to the pressure than elsewhere, and particularly in the great independent foundations like Harvard and Yale. There have thus been a number of fortresses of freedom from which, even at the height of McCarthyism, sorties have been made. Here again when it has proved possible to bring in the Federal Courts the forces of freedom have received succour and support. So that while it cannot yet be said that the battle has been won, here undoubtedly is the rallying ground from which already it is clear that the counter-attack is to be made.

In spite of von Stein's efforts in the field of politics and those of Fichte as literary prophet during the early nineteenth century, together with a few other voices of eminence raised in the same era, such as that of von Humboldt, freedom of speech was a much slower starter in Germany than in the U.S.A. or France. This was the age of Metternich and the Prussian monarchs were not to be out-done by him in reactionary zeal, and the ferment after the Karlsbad resolutions of 1819 was ruthlessly suppressed. The light of liberty shone rather luridly for a brief spell in 1848–49 and was almost at once effectively dimmed by Bismarck.

Thus it was not until 1919 and the coming of the Weimar Republic that freedom of speech had any real constitutional validity in Germany. The abortive constitution of 1849 undoubtedly remained a symbol of aspiration for German liberals and in Professor Castberg's view a clear line can be traced from it to Weimar, and indeed eventually to Bonn in 1949. There were, of course, isolated skirmishes in the intervening years, though they were on other fronts than the political. In particular there was sporadic unrest in the universities where freedom of teaching was supposed to be guaranteed by the Prussian constitution of 1851.

The Weimar constitution was exceedingly liberal in its conception and contained guarantees not only of freedom of speech but of other freedoms as well, such as freedom of opinion among civil servants and in the universities.

These were in fact paper freedoms, though as long as they were not subjected to stress and strain they appeared to be effective, and drew eulogies from university professors which Professor Castberg quotes, not without a certain irony. Under the long crisis of 1929 onwards they were proved to be without vitality, and Professor Castberg finds an important cause of this in the dominant positivistic philosophy of the German school of jurisprudence which, teaching that liberty was entirely the creature of this legislation, thereby indicated how easily it might be destroyed.

In any event Article 48 of the Weimar constitution itself provided the machinery for its own dissolution, for it gave to the President the discretionary authority to carry out extraordinary measures in any case where security and order were seriously threatened. And this was used for the destruction of the social-democratic government of Prussia, and in other ways to make the path straight for Hitler.

Article 5 of the Bonn Constitution guarantees freedom of speech, and later articles provide for the right of assembly, for freedom of association, for the right to form political parties, and for the other civil liberties.

The framers of the Bonn Constitution took warning from the earlier events, and have attempted to build up democratic institutions in a way which will prevent their being overthrown so easily. In Professor Castberg's view the new fundamental rights are based on a natural law doctrine, which in his opinion gives them added strength, and the phraseology used certainly lends support to this contention: in particular he underlines the fact that human dignity is the basis of political life in the new Germany. This, he says, "has a particularly gripping history" and was certainly violated by the Nazis in such a cynical and revolting fashion that the consequent revolution of feeling is not surprising. The real question is whether it has begun to make roots.

Many will feel, however, that more important than the concept that the fundamental rights have a "superpositive precedence" over positive legal provisions are the arrangements made for their protection in a special constitutional court, and the absence of any insidious power in the Executive to set them aside under a new Article 48. Nevertheless there are anti-fifth-column provisions directed at the type of insidious infiltration which overthrew democratic government in so many central European states (Article 8) and under which a fundamental right can be forfeited, and in particular a political party can be declared unlawful. Professor Castberg views the result with a very qualified optimism: he feels that while the obvious "demand for the unconditional supremacy of law and justice in political life is an impressive testimony to the spirit which dominates the Federal German Republic's constitutional system," the Constitutional Court has already given disquieting evidence of illiberality.

During a period of remarkable economic resurgence, and social satisfaction, the political waters of West Germany have, of course, not been seriously ruffled nor has the administration of the law in relation to the Communist Party—and this is, after all, the acid test—been nearly so liberal as that of the Supreme Court in the U.S.A. where public opinion has certainly been more hectic. Professor Castberg discusses at some length the judgment of the Constitutional Court of 1956 in which it struck down that party. He regards this decision on "a political problem as central as the question of prohibiting the Communist Party on the basis of judicial investigation of the party's entire ideology and agitating activity" as a remarkable "professional achievement." Here he speaks as a lawyer: as a statesman, however, he takes leave to doubt "whether in the long run it will prove beneficial to peaceful social development in Germany." Moreover pacifist agitation has also been declared illegal, and it may be doubted whether the outlawing of the discredited Nazi Party can be seriously weighed in the balance against these judgments. Should a time of real crisis develop, freedom in Western Germany might well be in jeopardy once more.

C.

THE RULE OF LAW IN A FREE SOCIETY: a Report on the International Congress of Jurists, New Delhi, India, January 5–10, 1959. Prepared by NORMAN S. MARSH. [Geneva: International Commission of Jurists. 1960. xi and 340 pp. No price stated.]

THE objects of the International Commission of Jurists are now generally known, and many lawyers, both practitioners and university teachers, have followed with interest and profit its successive publications. Among the important documents produced by the Commission during the last few years one may recall especially the reports on the denials of the Rule of Law in Hungary, Tibet and, most recently, South Africa. Now another important book has been issued, and it contains the verbatim proceedings and conclusions of the Congress of the International Commission which met at New Delhi in January 1959. The Commission's first International Congress had been in Athens in 1955, when the theme was "to consider what minimum safeguards are necessary to ensure the just Rule of Law and the protection of individuals against arbitrary action by the State." The Act of Athens resulting from that Congress laid the groundwork for the Commission's world-wide undertaking to formulate a statement of the principles of the Rule of Law. The New Delhi Congress followed naturally from this. Based on a Working Paper, which confirmed that the Rule of Law was not solely an attribute of one specific legal system or an obsolete concept from the past, but was the expression of timeless principles of general application symbolising justice, the participants examined in committees four main topics in detail: the Legislative and the Rule of Law, the Executive and the Rule of Law, the Criminal Processes and the Rule of Law, and the Judiciary and the Legal Profession under the Rule of Law. The resultant Declaration of Delhi, which reaffirmed the principles expressed in the Act of Athens, recognised "that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised." The Congress therefore requested the International Commission of Jurists "1. To employ its full resources to give practical effect throughout the world to the principles expressed in the conclusions of the Congress. 2. To give special attention and assistance to countries now in the process of establishing, reorganising or consolidating their political and legal institutions. 3. To encourage law students and the junior members of the legal profession to support the Rule of Law. 4. To communicate this Declaration and the annexed conclusions to governments, to interested international organisations, and to associations of lawyers throughout the world."

The great value of the work of the International Commission, and particularly of this report, is in bringing the Rule of Law to life as an important force in the world. No longer is it just a jurists' theory. It is an ideal which the members of the Commission are pledged continually to strive towards until final worldwide achievement. This volume contains, as well as the proceedings at Delhi and the Declaration of Delhi, the Act of Athens, the Questionnaire sent out to many countries and lawyers for the purpose of establishing common ground for the definition and elaboration of the Rule of Law, and the Working Paper on the Rule of Law in a Free Society, upon which the work done at Delhi was based. The whole has been prepared by Mr. Norman Marsh, currently Director of the British Institute of International and Comparative Law, and a former Secretary-General of the International Commission, and there is a Foreword by the present Secretary-General, M. Jean-Flavien Lalive. To Mr. Marsh in particular the thanks of all freedom-loving lawyers are due.

D. C. M. YARDLEY.

A Guide to Compulsory Purchase and Compensation. Fourth edition. By R. D. Stewart-Brown, Q.C., M.A. [London: Sweet & Maxwell, Ltd. 1960. xviii and 135 pp. (with index). 25s. net.]

"Compulsory purchase," though clearly with us to stay, is really a distortion, if not a deliberate misuse, of the language. There is little of a "purchase" about a transaction where a public authority takes a private owner's land, and there is nothing in the legislation (but for the exceptional cases of purchase notices—see p. 21 *et seq.*) compelling the authority concerned to undertake any particular acquisition. Nomenclature apart, however, this is an important branch of modern practical law, and the present guide is more convenient and accurate than most small books on the subject. Subscribers to the useful *Encyclopedia of Compulsory Purchase and Compensation,* by the same author and publishers, should be warned that the present book is almost verbatim a reprint of the "General Statement" in the larger work.

Your reviewer has read earlier editions of this book on several occasions and has in practice found the "guide" to give useful indications as to where the details of the law may be found; particularly useful is the list of statutes authorising compulsory acquisition which once more appears in the appendix. On page 12 the learned author refers to the rights of sewerage and water authorities to lay mains in privately owned land, and states that they thus acquire an interest in land for which they must pay compensation. No one can quarrel with this correct statement of law, but it could perhaps have been indicated that in these circumstances the acquiring authority merely have to serve a notice under the appropriate statutory provision, and do not have to follow the whole of the normal elaborate authorisation procedure. The exact nature of the rights acquired in these circumstances is far from clear, but this is perhaps scarcely a matter which could be pursued in an elementary practice book of this kind.

The book is well produced and equipped with the usual apparatus of indices.

J. F. Garner.

Law of Banking. Fourth edition. By Lord Chorley, assisted by J. Milnes Holden. [London: Sir Isaac Pitman & Sons, Ltd. 1960. xxviii and 319 pp. 35s. net.]

Securities for Bankers' Advances. Third edition. By J. Milnes Holden. [London: Sir Isaac Pitman & Sons, Ltd. 1961. xxxiv and 371 pp. 35s. net.]

These works are now so well established in their respective fields that the task of the reviewer welcoming their new editions can in large part be discharged by merely saying that they are well worthy of their predecessors.

The principal change in Dr. Holden's book is a considerable expansion of his treatment of the pledge of goods in relation to import and export transactions, though there have been a number of other additions and alterations. Changes in Lord Chorley's book are more immediately obvious as this is the first edition to appear since the Cheques Act, 1957, and the provisions of this Act are fully discussed.

A joint review is, of course, justified not only because of the common subject-matter of the two books and the fact that the new editions appeared within a short interval of one another under the imprint of the same publisher but also because the chapter on securities in Lord Chorley's book has been written by Dr. Holden. Lord Chorley also acknowledges Dr. Holden's assistance in the section on documentary credits but here a curious conflict occurs between the learned authors on the use of the terms "confirmed" and "irrevocable" in relation to credits. Lord Chorley, at p. 188, n. 2, appears to favour the view that these terms are for legal purposes synonymous whereas

Dr. Holden, at p. 245 of his book, says that this view is "strongly to be deprecated." Gutteridge and Megrah, *Bankers' Commercial Credits*, p. 13, and Davis, *Commercial Letters of Credit*, 2nd ed., pp. 40–41, appear to support Dr. Holden as to modern usage and this seems to be confirmed by the Australian case of *Saffron* v. *Société Minière Cafrika* (1959) 100 C.L.R. 231 and by the statement of facts in *British Imex, Ltd.* v. *Midland Bank* [1958] 1 Q.B. 542.

One or two minor points of comment arise on Lord Chorley's book which may be considered for future editions. The cases relating to R/D cheques always provoke lively discussion and hence it may be worth while to add to the cases already mentioned a reference to *Plunkett* v. *Barclays Bank* [1936] 2 K.B. 107 at 120, where du Parcq L.J. expressed his agreement with Scrutton L.J.'s view in the *Flach* case that the expression was not capable of a defamatory meaning. Against this might be set the more recent Irish case of *Pyke* v. *Hibernian Bank* [1950] I.R. 195 where a majority of the judges who heard the case were of a contrary opinion. The references to the Ministry of Health at pp. 163–164 should be replaced by references to the Ministry of Housing. The references to bills of lading at p. 277, n. 5, and to charterparties and bills of lading at p. 279 are no longer correct as the stamp duty on these documents was abolished by the Finance Act, 1949. The 2s. 6d. duty on sealed memoranda of charge in respect of stocks and shares mentioned at p. 284 should be 5s. At pp. 45–46 there might be a reference to the Resolution of the Committee of London Clearing Bankers of May 1958 to discourage customers from using non-transferable cheques.

Turning to Dr. Holden's book, the reader may be puzzled to find a reason for relegating so important a topic as securities given by limited companies to the very end of a group of chapters headed "Miscellanea" and the end of the book itself, the more so since the chapter on company securities takes up substantially more space than the other six miscellaneous items taken together. Surely companies are entitled to priority over ships, if not to a section in their own right? Another minor point is that though Dr. Holden treats very fully problems of undue influence arising between husband and wife, it might be as well to add a reference to *Re Lloyds Bank, Bomze* v. *Bomze* [1931] 1 Ch. 289, where it was held that fiancé and fiancée were in a relationship giving rise to a presumption of influence.

The learned authors may congratulate themselves that their suggestion that *Coutts* v. *Browne-Lecky* may be circumvented and an infant's overdraft secured by an indemnity from an adult, as distinct from a guarantee, has been confirmed by the recent Court of Appeal decision in *Yeoman Credit* v. *Latter* [1961] 1 W.L.R. 828.

Perhaps the most outstanding merit of these excellent books is their refreshing sense of proportion and firm common sense. Practice and law are most happily combined as in Dr. Holden's warning at p. 278 to country bankers to visit their farmer customers unannounced lest an unscrupulous farmer borrow his neighbours' cattle to create a false air of prosperity. The statement at p. 256 that the art of successful documentary credit work is to know when to accept documents not strictly in accordance with the requirements of the credit could almost rank with Selwyn L.J.'s famous dictum that the main duty of a trustee is to commit judicious breaches of trust. The reader's only regret will be that there are not more books such as these in so many other fields of commercial law.

A. H. HUDSON.

PUBLIZITÄT UND GEWINNVERTEILUNG IM NEUEN AKTIENRECHT. DRS. H. KRONSTEIN and C. P. CLAUSSEN. [Frankfurt-am-Main: Vittorio Klostermann. 176 pp. DM. 19.50.]

THIS is not the only country where the reform of company law is currently being considered. In Germany, too, the statute governing public companies,

the Aktiengesetz of 1937, has been subjected to critical examination by government departments, professional bodies and commentators for a number of years, and there is a fair prospect that the draft of a new Aktiengesetz produced by the government in March last year may soon take its place on the statute book, but probably with extensive modifications.

The book under review is concerned with only two aspects of the reforms to be embodied in the new statute, namely, the more extensive publicity which companies will undoubtedly be required to give to their affairs, and the division of functions between the management and shareholders in respect of the approval of companies' annual accounts and the declaration of dividends. The first twenty-nine pages of the book are taken up with a justification of the demand for greater publicity in the interests of the shareholders generally as the ultimate controllers of the company's destinies, of the shareholders individually as proprietors of the company's undertaking, and of the public at large as potential investors. The need for such a justification seems strange to Anglo-Saxon ears; the increasing requirements for the publication of information in prospectuses, accounts and directors' and auditors' reports in successive Companies Acts over the last hundred years has accustomed us to accept the need for publicity, and we concern ourselves only with the question of how extensive it should be. In Germany, however, there is still a school of thought which would restrict publicity to the minimum necessary to assure the shareholders that their company is being honestly and properly managed, and would repudiate any claim by the public to know about the company's internal affairs. This viewpoint is strengthened by the present structure of German companies, where the directors (the Vorstand) are insulated from direct contact with shareholders by the existence of an intermediate body, the Aufsichtsrat or supervisory committee, which consists of up to fifteen persons, two-thirds of whom are elected by the shareholders and one-third by the company's employees. It is the Aufsichtsrat which elects the directors, and it is to the Aufsichtsrat that the directors must submit the company's annual accounts and their report for approval, though admittedly these documents are then submitted to the shareholders in general meeting together with the Aufsichtsrat's own report and the report of an auditor appointed by the shareholders. This structure inevitably leads directors to think of themselves as primarily responsible to the Aufsichtsrat, and to the view that accountability to the shareholders is a scarcely tolerable nuisance, and that a duty to publicise the company's affairs to the world would be a wholly unjustified invasion of privacy. Neither the Government in their draft statute nor the authors of the book under review share this viewpoint, but they differ materially in the way they seek to strengthen the shareholders' position.

The second part of the book under review deals with the requirements of the law as to the contents of prospectuses and similar publications designed to induce subscriptions for, or dealings in, shares or bonds of companies. German law at present is meagre in this respect, and is unlikely to be much more effective if the Government's draft statute is adopted. The authors contrast this with what they consider to be the far more wholesome position in the United States where new issues and dealings in securities, both on and off the stock exchanges, are closely controlled by the Federal Securities and Exchange Commission, and where publicity is required in respect of all matters which are material to an investor to an extent which makes the requirements of our own Companies Act, 1948, 4th Sched., look trifling.

Next, the authors examine the requirements of German law in respect of the contents of a company's annual accounts. The present law contains a detailed scheme for the contents of these accounts, and requires many items, which in this country would be shown as a lump sum, to be itemised in a way which cannot really be of much help to a shareholder or investor. For example, trade debts owed to the company must be itemised according to whether they are simple debts, or whether a cheque or bill of exchange has been given in

respect of them (Akt.G., § 131 I A, III 8, 12 and 13). The classification of these items is, moreover, faulty. For example, uncalled share capital appears at the head of the assets side of the balance sheet as a permanent asset, but when called up and represented by cash at the bank appears as a current asset, and then, when spent on buying the machinery or equipment for which it was required, appears again as a fixed asset (Akt.G. § 131 I A, I, II and III 7). The authors and the Government draft statute propose many useful improvements in the form of accounts, but the English reader may be pardonably excused for wondering why it is necessary to make the fine distinctions drawn between Abschreibungen and Wertberichtigungen (depreciation) and Rückstellungen and Rechnungsabgrenzungposten (provisions). On the other hand, neither the authors nor the Government draft statute would require disclosure of the many material matters which our Companies Act, 1948, 8th Sched., requires annual accounts to reveal, and in particular, neither of them propose to make the publication of group accounts by holding companies compulsory.

The fourth part of the book deals with the approval of annual accounts prepared by the directors and the declaration of dividends. The present law authorises the Aufsichtsrat to approve the accounts, and shareholders are only consulted if the Aufsichtsrat refuses its approval (Akt.G. § 125 I and III). The declaration of dividends is the function of the shareholders in general meeting, however (Akt.G. § 126 I), but is of no real significance because in the balance sheet the directors always show as the profit available for distribution the amount they wish to have distributed, and they prevent the distribution of a larger sum by transferring the remainder of the year's earned profit to reserves (Rücklagen). This is why a German balance sheet never shows a balance of profit carried forward from an earlier year. The Government draft statute seeks to remedy this situation by transferring the power to create reserves or, alternatively, to distribute the whole of the year's profit, to the shareholders in general meeting. The authors oppose this, however, first because they consider that the decision what reserves are required for future trading is a managerial one which can only be taken by the directors, and secondly because they think that the power of general meetings to dispose of the year's profit as they wish will be evaded by the directors creating hidden reserves (stille Rücklagen) by undervaluing the company's assets or by making over-provision for its liabilities. The authors would prefer to confine the shareholders' powers to dismissing directors whom they find wholly unsatisfactory, thus putting no inducement in the way of directors to lay misleading accounts so as to forestall too liberal a distribution of dividends. The assets of the company needed for its future development would then be exhibited "in einer gläsernen, aber verschlossenen Tasche." May this reviewer suggest, without undue national pride, that we achieve this same result quite happily by Table A. Part I, art. 114, of the Companies Act, 1948.

R. R. Pennington.

Copyright and Anti-Trust. By J. Taubman. [New York: Federal Legal Publications, Inc. 1960. viii and 217. $8.50.]

The thesis of this book, whose author is an experienced member of the American copyright and anti-trust bar, is that the American anti-trust laws have been wrongly applied to the world of entertainment. The trouble has stemmed from the celebrated decision in *United States* v. *Paramount*. This case, which began in 1938, finally resulted in a decree in 1946 declaring "block-booking" of films illegal. The repercussions of this suit have been widespread enough, for up until 1952 "movie" cases constituted some 25 per cent. of the total anti-trust suits in U.S. District Courts. Since then the onslaught of the Government on the film industry has been overshadowed by

the impact of television. The Government has therefore turned its attention to the television industry, though in *United States* v. *Twentieth Century-Fox Film Corp.*, 137 F.Supp. 78 (1955) it met with something of a rebuff, in the refusal of the court to apply the principles of the *Paramount* case to that industry. The author, who deplores the effect of the *Paramount* case on its own territory, not unnaturally warmly supports the decision in the *Fox* case. In Mr. Taubman's view there is a strong case for the regulatory functions of the anti-trust laws being taken away from the Department of Justice and handed over to a Department of the Arts (to include such activities as the cinema and television). This would, it is argued, make possible a new approach to "cultural" questions in terms of twentieth-century realities rather than the outmoded conceptions of competition derived from a *laissez-faire* age.

The transactions which have been the subject of this massive American litigation are not in themselves unfamiliar in this country, though many of them would fall outside the scope of our much more limited monopoly legislation. That legislation, being limited to "goods," could not extend, for instance, to commercial television networking arrangements, nor would it apply to an agreement, of the *Paramount* type, under which a distributor is enabled to compel an exhibitor to accept one or more films in order to obtain a licence for another film. A widening of the terms of the Restrictive Trade Practices Act, 1956, might cause that Act to penetrate into many corners of the entertainments industry now free from its operation. It would certainly be as well before contemplating any such development to take a close look at the consequences wrought in America by the invasion into these spheres of the anti-trust laws. For this purpose Mr. Taubman has incidentally provided a useful introduction.

Dennis Lloyd.

Taxation of Foreign Income. Cases and Materials. By Boris I. Bittker and Lawrence F. Ebb. [Stanford, California: International Legal Studies Program, Stanford Law School, Stanford University. 1960. xii and 580 pp. $5.00.]

This is a collection of cases and materials prepared by Professor Bittker of Yale University and Professor Ebb of Stanford University. The work is primarily designed to show the application of United States tax laws to income derived from foreign sources by nationals and residents of the United States of America and to income derived from the United States by residents of foreign countries. A certain amount of non-American material is included. Among English cases one notices, in particular, *Firestone Tyre and Rubber Co., Ltd.* v. *Lewellin* [1957] 1 All E.R. 561 and *Government of India* v. *Taylor* [1955] A.C. 491. Throughout the work the authors have added Notes which contain references to further material and state questions for consideration by the student. Great care has obviously gone into the selection of material and the book no doubt is a useful tool.

The English reader cannot help being struck by the fact that there are American Universities which provide courses on so esoteric, yet eminently practical, a subject as the taxation of foreign income and that the authors suggest that "this casebook may be of interest not only to those whose major interest is in the field of taxation, but also to those teaching in the field of international transactions, international law or, indeed, conflict of laws" (p. iii). In both respects the English method of approach is quite different. Whether it is also lacking in progressiveness is a question which cannot be pursued in the present context.

F. A. Mann.

Die Haftung für die Hilfspersonen der Schiffsbesatzung nach deutschem, französischem und englischem Recht. By Panayotis Sotiropoulos. [Stuttgart: Ferdinand Enke. 1960. viii and 65 pp. No price stated.]

This is a useful compilation of the rules relating to the liability of the shipowner for the negligence of crew, pilot, tug and stevedores under German, French and English law. Special provisions of some other laws are also noticed. The pitfalls endangering the path of the Continental lawyer are best illustrated by the author's praise for the simplicity of the English solution.

It is interesting to learn that Germany has not ratified that article of the collision convention of 1910 which relates to the compulsory pilot, so that under German law the shipowner is not liable for his negligence. None of the foreign countries appears to have ratified the Brussels Convention of 1957 concerning the limited liability of shipowners, so that important differences between English and Continental law survive. The author hopes that the 1957 Convention will soon be ratified to achieve uniformity, but even this would of course not affect the differences of the grounds of liability.

From the point of view of the academic lawyer the subject of this book is of slight interest, for the rules, however much they differ, do not involve important principles. A comparison of such technical rules, though useful since searches are made unnecessary, offers little scope for scholarly acumen.

Conflict of laws and of jurisdiction were beyond the scope of this little volume.

O. C. Giles.

Ten Rillington Place. By Ludovic Kennedy. [London: Victor Gollancz, Ltd. 1961. 308 pp. 21s. net.]

I began reading this book with a considerable doubt in my mind whether any fresh light could be thrown on the sad case of Timothy John Evans, who was executed in 1950 for the murder of his little child Geraldine, and who was also believed to have murdered his wife. The case is distressing because in 1953 it was discovered that another person, John Reginald Halliday Christie, living in the same house, had been committing sexual murders in considerable numbers, going back as far as 1943 and 1944, and Christie had been the principal witness for the prosecution at the trial of Evans. My fear was that yet another book containing a passionate appeal on behalf of Evans might excite in me strong counter-feelings causing me to dig in my intellectual toes, as I have a habit of doing in face of impassioned argument. I had a similar expectation about Mr. Arthur Koestler's book *Reflections on Hanging* before reading it for review, but at the end I came to the conclusion that his fiercely partisan approach had much to be said in its favour. I have come to the same conclusion about Mr. Kennedy's book. Unlike the more sensational kind of crime literature, which wallows in sordid detail or exults in forensic exploits, largely with a view to titivating the reader's fancy and quenching the apparently inexhaustible thirst for sensation, the present book rarely descends to vulgarity and contains few purple passages. When the author does let drop a few acid comments or raises his voice to a shrill note, one is almost bound to agree with him, and one must always bear in mind the author's purpose, which is deadly serious.

His idea has been to review the whole of the evidence tending to show that Evans was innocent, and by patient inquiry and diligent investigation, during which he has apparently seen nearly everyone who was connected with that case, and has been able to make use of some documents which have not previously been used, to reconstruct the story in a careful and well-documented manner, albeit from the premise that Evans was in fact wrongly convicted.

The result is to cast doubt on the conduct of nearly everyone concerned

with the case, not necessarily on their honesty and integrity, for the trouble was that some of these people appear to have so far convinced themselves that Evans was in fact guilty that they were led to distort the evidence to prove that he was, and in this way jumped too readily, if the metaphor may be permitted in this context, to Evans' own conclusion. The police appear to come out of it particularly badly, being accused of suppression of evidence, suggesting that certain witnesses should change their story so that it would fit in neatly with the police theory of what actually happened, and so on. Both the judge at the trial of Evans and the special commissioner, Mr. J. Scott Henderson, Q.C., who conducted the inquiry ordered by the Home Secretary after Christie's conviction but before his execution, come in for their share of criticism, for making mistakes and misrepresentations with regard to the evidence, and for a certain complacency and prosecution-mindedness which led too easily to false conclusions. Mr. Scott Henderson might have been excused a great deal in view of the extremely short time allowed him to make his inquiry and prepare his report, but it is phrased with such smug assurance and couched in such uncritical terms that I fear he stands condemned. Perhaps he found himself hopelessly compromised by the requirements of speed and certainty.

The three main villains in the piece remain for discussion. Evans was undoubtedly a weak and inadequate fellow, of low intelligence and a pathological liar. Perhaps, like Rouse, he hanged himself with his own distortions of the truth. Christie was a weak and inadequate pathological killer, with necrophilic tendencies, which Mr. Kennedy carefully traces to the early home background and to various psychological factors. This may explain: it does not of course excuse. The third villain in the piece is the law relating to capital punishment. Admittedly, this has been modified in 1957, with the result that it is highly possible, if not probable, that if Christie were tried today, he would not be found guilty of capital murder. This is not because the case would not be one of capital murder, for, although strangling women for sexual reasons is not a capital offence, Christie had committed consecutive murder, which is capital. However, he might well find shelter today under the new defence of diminished responsibility, which reduces murder to manslaughter. He might thus be spared, whereas Evans, if he were tried today, on the same facts as were known in 1950, would probably be found guilty of non-capital murder. This is an idle speculation; what cannot be denied, and is more relevant, is that if in 1950 we had known the facts as we know them now, it is very unlikely that Evans would be prosecuted for murder, leave alone convicted. The most that can be laid at his door with any certainty is that he probably assisted Christie to carry his wife's body down to the first floor flat, after her death. He was an accessory after the fact to her death, but as it seems likely that he thought it was death as a result of an attempted abortion, he would be an accessory after the fact to manslaughter, at most. As Mr. Scott Henderson himself remarks, "if we had known then what we know now the trial of Evans would have been very different from what it was" (para. 14 of his Report).

Surely the main moral of the story is that since human judgment is essentially fallible (and is proven to be even in that rarefied and embalmed form called British justice), there is an overwhelming case for the abolition of capital punishment, on this if on no other ground. If both Evans and Christie were alive today, although there is (rightly or wrongly) no possibility of a re-trial in English criminal law, at least there could be some administrative review, and the exercise of the prerogative of mercy. This book calls for a new inquiry, but the Home Secretary has recently stated that he rejects this demand, on the ground that no new facts are likely to be revealed and that witnesses' recollections of events in 1949 must inevitably have been dimmed by the passage of time. Also rejected is the suggestion that Evans should be posthumously pardoned. The question of disinterring

Evans' remains and allowing his mother to have them for what Mr. Kennedy calls a decent Catholic burial does not therefore arise, which, from the point of view of the prison authorities, is probably just as well, in view of the congestion in the burial ground at the prison where the execution took place. Some day, no doubt, Evans' name will be cleared, but we shall probably have to get rid of capital punishment first. And it now appears that legislation would be required to permit the removal of Evans' remains from the prison precincts.

In the meantime, there is something else we must consider, and that is, how to ensure that such mistakes cannot occur again. I have only two suggestions. One is that the Evans–Christie case should be used in the training of police officers as a classic example of the dangers of taking a firm view of the evidence and then building up a watertight case on that assumption, ignoring other possible leads and theories. The second is that the whole of the law and practice surrounding the taking of confessions and their use in criminal trials to prove guilt should be reviewed. It is not enough to say that we shall set up a committee to review the Judges' Rules. It may be that we should go so far as to say that no confessions shall be used in court unless they are either repeated by the accused at the trial or are corroborated by independent evidence.

J. E. Hall Williams.

The English Prisons: Their Past and Their Future. By D. L. Howard. [London: Methuen & Co., Ltd. 1960. xv and 174 pp. (with index and appendices). 21s. net.]

The first part of this book, as the author tells us in the Introduction, "surveys the history of imprisonment in England from the end of the eighteenth century to the present day." Part Two describes some of the problems which still have to be solved "if we want to make sure that by imprisoning offenders against the law we are really going to help them as individuals and thereby reduce the incidence of crime."

The history is well told by Mr. Howard, with many extracts from contemporary sources and several excellent photographs and sketches to make it interesting. Anyone who wants to get a general idea of the gradual evolution of our prison system from being a retributive and repressive régime to one geared to rehabilitative and humanitarian assumptions will find this account readable and extremely instructive. It may not replace the more standard sources which the serious student must consult, and there are some gaps in the story; for example, we hear nothing of the work of Sir Walter Crofton in Ireland, and the progressive stage system is ascribed entirely to Jebb. Nevertheless, there is an excellent description of the conditions at the end of the eighteenth and in the early part of the nineteenth centuries; the struggle to improve them; the debate on methods of confinement (solitary or silent system?); and the steps whereby state inspection and control was introduced, giving way in turn to the "nationalisation" of the prisons in 1877, and the founding of the Prisons Board. The subsequent history of the Prison Commission under du Cane and Ruggles Brise brings us down to the dawn of the modern period, and the way in which the Report of the Gladstone Committee paved the way for the efforts of Sir Alexander Paterson, Sir Lionel Fox, and others, to build a flexible and imaginative system. While these efforts have been seriously hampered in recent years by too many prisoners and too little money, there can be no doubt that splendid innovations have been made, and courageous experiments are being tried.

The present is undoubtedly a time of change for prisons and borstals alike. Despite the heavy pressure of events and circumstances outside, the Prison Commission are bravely attempting to build a new world within the walls and in the many open institutions which are now such a notable feature of the

system. Mr. Howard's account of all this is both lucid and well-informed. He may be a little too dogmatic at times in his assertions, and makes some rather extreme suggestions. For example, he confidently asserts at p. 155 that "decentralisation of the powers now tightly held by the Prison Commissioners in London is essential if the prisons are to function really efficiently in the future." At times his comments seem rather equivocal and tentative. However, on the whole his judgment is extremely sound. He rightly deplores the inadequacy of the psychological and other professional services employed in the general therapeutic endeavour; he stresses the need for providing full employment for prisoners, and the need for the reconstruction of buildings so as to provide more opportunity for using the small group as a therapeutic unit. (We have been struggling far too long with these large amorphous communities inhabiting ancient and unsuitable premises.) Not the least interesting part of the book is the discussion of prison design. It seems a pity that it was not possible to include in one of the Appendices a copy of the plans for the new prison at Blundeston, instead of printing that for the old prison at Lewes, built in 1854. A second Appendix contains a Note on Prison Literature, which contains a fair selection of bibliographical references, grouped under different heads. Unfortunately some of the references are to editions of books which are not the latest, *e.g.*, the texts on *Criminology* by Barnes and Teeters and Sutherland, and Elizabeth Glover's book on *Probation and Re-education.*

J. E. Hall Williams.

The Detection of Secret Homicide. A Study of the Medico-legal System of Investigation of Sudden and Unexplained Deaths. By J. D. J. Havard, M.A., LL.B., M.B., B.CHIR., Barrister-at-Law. [London: Macmillan & Co. 1960. xv and 253 pp. 35s. net.]

The Cambridge Institute of Criminology has widened the scope of the valuable "English Studies in Criminal Science" and the first volume of its new series, which now appears under the general title of "Cambridge Studies in Criminology," is concerned with an important medico-legal subject for which the author, with his academic degrees in the two fields, possesses evident advantages: an historical and critical inquiry into the methods used for the investigation of sudden and unexplained deaths. The coroner and his jury have been under fire from various quarters in this country in recent years and it is therefore all the more important to have this monograph which is described as "the first attempt to treat the subject in a thorough and expert manner by an author qualified in both the medical and legal professions." An extensive bibliography and a short chapter on "Some leading foreign systems of Medico-legal Investigation" increase the usefulness of the work.

There is no doubt that even now many cases of death by some form of homicide remain wholly undiscovered because the body of the victim is disposed of without any adequate investigation or even examination ever taking place. There is also little doubt that in many of these cases detection would have been possible by the observation of a few comparatively simple precautions, the chief of which is the necessity for an autopsy by an experienced forensic pathologist in all cases of unexplained death.

Unfortunately so awkward has been the relationship between the medical profession and the law courts in this country in the past, and such the historical development of the coroner's inquests, to whom the task of dealing with all deaths not obviously arising from natural causes has always fallen, that this comparatively simple proposition is still far from being realised. The coroner and his jury, having proceeded in their semi-judicial inquiry for centuries on the basis of witness evidence, have been very slow to accept medical evidence as decisive, first because it was considered with suspicion as unreliable and

also perhaps because it may have been resented as an abrogation of functions long exercised by the jury. As Dr. Havard points out, it is true to say even now when, by the Coroners (Amendment) Act, 1926, coroners are entitled to dispense with an inquest and dispose of a body by post mortem, that many coroners still prefer to hold an inquest without autopsy, a method which, as here described,

> "apart from being unscientific and inaccurate, causes trouble to the relatives, wastes the time of witnesses, and is an unnecessary charge on local funds."

Extreme fluctuations in the practice of one area as opposed to another with regard to the number of autopsies and the kind of qualifications demanded from those who carry them out make it obvious that in the present working of the system itself there are reasons why the discovery of foul play is still so often left more or less to chance.

It would seem at first sight paradoxical that the author, whose book is in so many ways highly critical of the existing practice in this field, should eventually arrive at the conclusion that the English system is "basically superior to any other in existence in the world." Unfortunately, his discussion of the alternatives in use elsewhere (on less than twenty pages) is too scrappy to allow any definite conclusion whether this view is well founded. It is probably true that in the United States, where the so-called "medical examiner system" is rapidly replacing in most states the coroner, the almost universal condemnation of the old system is due to abuses which find little counterpart here. On the other hand the "Continental system," by which all the duties in this connection fall automatically and directly upon the police, would seem to have, at least theoretically, the advantage of placing the burden at once where it eventually belongs, namely, on a properly equipped forensic institute. Dr. Havard dismisses this alternative with the rather sweeping statement that "police officers are not qualified to make . . . a decision . . . whether or not autopsy or other medical examination is necessary," without reason, although he is himself aware that "few aspects of comparative law could yield more practical results than a comprehensive study of medico-legal investigative systems." For lack of any authority other than a few American ones and a reference to a single case which occurred a year or two ago in Portugal and became known, or rather notorious, in this country, his further statement that on the Continent "medico-legal autopsy is resorted to only in cases of *obvious* suspicion" (italics mine) is too vague to be meaningful.

Nonetheless, though the separation of the functions of the coroner from those of the police in such matters is purely of historic origin in this country, it may well be that it does correspond to a real need even now which might be described as psychological. Dr. Havard considers that notification of an unexplained death to the police is less satisfactory than notification to an independent medico-legal officer because "it imports suspicion of criminality to a far greater extent. . . . It follows," he says, "that the relatives of the deceased, the medical profession, undertakers and others with special knowledge will report sudden and unexplained deaths more readily to a coroner than to the police."

This may well be true. If so, it is all the more reason why the unsatisfactory system of death certification and notification in this country, as well as the obvious shortcomings in the appointment and the qualifications of coroners, should be amended soon. Dr. Havard goes so far as to suggest that the 600 or more coroners now carrying on this work (many of them on a part-time basis) should be reduced to some twenty or thirty medically as well as legally qualified men working with proper facilities in much larger areas. This and other proposals put forward in this book could hardly be achieved without legislation, but, as Dr. Radzinowicz says in his introduction, a first useful step towards reform will be taken if this book stimulates discussion.

H. A. HAMMELMANN.

The Courts of Law: British Council Study Box, No. 35.

The main purpose of the British Council is to make the British way of life known to foreign, or perhaps one should say overseas, people, and to ensure that they have a sympathetic understanding of it. One method which it has pursued during recent years is that of the "study box." The idea is to provide a box of material for a group of persons desirous of studying together, and discussing, some particular aspect of British culture. There is obviously much to be said in favour of this plan, yet it is clearly beset with difficulties, and it would be interesting to know something of the results which have been achieved.

The Council are evidently satisfied with their experience of the method, because they are going ahead with it, and among their latest output of study boxes is the one under review. They have been fortunate in securing the services of Mr. C. P. Harvey Q.C. to advise on the collection of material. Readers of this *Review* are familiar with his independence of judgment and originality of mind; he has also had the advantage of legal work in Germany during the years of occupation, so that he is familiar with one of the strongest and most successful of the civil law systems.

As was to be expected Mr. Harvey has got together an interesting and comprehensive collection of material. I do not think that he has been completely successful in his task, but the extent of his achievement will be measured by the usefulness of the box in practice, and theoretical criticisms emanating from the study may well be discounted in the discussion room. In any case it is one of the great virtues of a scheme of this kind that it lends itself to constant modification and improvement in the light of the reactions of those using the box. Certainly to have before one copies of most of the documents used in connection with an English criminal trial must give an added sense of reality to one's studies: it does not require a detective to discover that some of the cases used are ones which have come before Mr. Harvey himself; he sits as Chairman at Quarter Sessions.

The material provided which is certainly much more extensive than one would have expected consists of a guide for the group leader; fifteen copies of a study booklet; no less than twelve short books or pamphlets; three folders containing a great deal of practical documentation, mainly related to the administration of the criminal law (together with a number of notes on specific items contributed by Mr. Harvey); two tape recordings of a criminal trial, together with script, and one of a discussion on professional ethics, and four coloured sheets; these latter which are at about third form level can hardly be of use to students who are competent to understand the more technical documentation.

Those who had experience of discussion group work during the last war are aware that the role of the leader is of crucial importance. The official of the British Council who drew up the general introductory suggestions realises this and his pages are full of wisdom. Unfortunately Mr. Harvey in his detailed notes on "how to use the box" does not parallel this with a similar set of suggestions describing the specific object of the study. He plunges *in medias res* and I am afraid that the leader, unless he has experience of the work or is a man of exceptional talent, will find it almost impossible to find his way about the material, much of which is highly technical and detailed. No doubt a careful perusal of the books in the box together with the charges, committals depositions, recognisances, probation orders, notices of appeal and other documents provided would eventually enable an intelligent leader to find his feet, but one imagines this work being undertaken by him in his spare time and I have a feeling that he will stagger a bit when he finds what he is up against. At the same time many of the suggestions for leading the group are of the greatest value, particularly the insistence that constant comparison with local procedures should go on.

Not that the books given are difficult: indeed they are largely taken from the Hamlyn series and are well chosen: *Freedom Under the Law* by Lord Denning, and the same author's *Road to Justice*, *Trial by Jury* by Sir Patrick Devlin, *The Proof of Guilt* by Dr. Glanville Williams are typical of them. Two good chapters from Professor Hood Phillips' *First Book of English Law* are separately printed, and the Penguin on *Magistrates' Courts* by Mr. Giles is included. Mr. Harvey, author of the *Advocate's Devil,* is naturally interested in professional ethics and was no doubt justified in including Sir Malcolm Hilbery's admirable lecture on Duty and Art in Advocacy; the guide to professional conduct for solicitors by Sir Thomas Lund, recently published by the Law Society, strikes me however as altogether too technical and detailed for the requirements of the discussion groups contemplated. The two British Council pamphlets on Criminal Justice, and the English Bar and Civil Litigation are, perhaps naturally, included. I discussed these in 21 M.L.R. 701 and a reperusal of the English Bar and Civil Litigation has not persuaded me that with all its talk of the "order of the coif," etc., it is at all sensible reading for an overseas student desirous of getting to understand the English legal system of today. The use to which all these books are to be put is not made clear. Are they to be passed round among the members of the group, or are they obtainable from the local library of the British Council, or are they for the sole use and benefit of the leader? Certainly where a library is available a rather more extended study list would be useful: it is a great gap that there is no reference to Dr. R. M. Jackson's *Machinery of Justice in England.*

The choice of documentation in the three folders is puzzling. Thus in Folder II there is material on three murders: one as long ago as Crippen, two larcenies (one of which is tape recorded and has an element of robbery, a highly technical offence) and an assault (summons only). There is also tucked away in this folder a solitary civil case, *Kuchenmeister* v. *Home Office*, presumably inserted because of its civil liberty interest: apart from some material on habeas corpus there is little on this vital subject. Incidentally the note on the tape recorded larceny case is not contained in this folder, but in Folder III which is mainly concerned with miscellaneous, though important, matters, such as legal aid (contributions by Lord Evershed and Judge Aarvold of the Central Criminal Court), the English Judicial System (a lecture by Sir George Coldstream), the Declaration of Delhi, which is not after all particularly English, and the Structure of the Judicial System in Overseas Territories (contributed by Sir Albert Napier). Folder I is largely taken up with becoming a solicitor, containing prospectuses relating to examinations, etc., issued by the Law Society, but it also contains the Legal Aid Acts and the Regulations thereunder which one would have expected to find in the same folder as the Evershed-Aarvold memoranda—perhaps Mr. Harvey feels that it is part of his job to uphold the reputation of the English for being unsystematic!

One might also criticise the title of the study box. "Courts of Law" is far from an accurate description of its contents which are both wider and narrower than the title suggests. It is certainly not easy to find an accurate descriptive title, though Aspects of English Legal Administration would be nearer the mark. And I am sure that group leaders would appreciate a plan for repacking their material into the box: this requires great ingenuity!

C.

COMMON MARKET FISCAL SYSTEMS. By E. B. NORTCLIFFE. [London: Sweet & Maxwell, Ltd. 1960. 90 pp. £1 1s. net.]

MR. NORTCLIFFE'S book is a reprint, now brought up to date, of a series of articles which originally appeared in the *British Tax Review*, dealing in broad

outline with the fiscal systems of Italy, Belgium, Holland, France and Western Germany. Only about fourteen pages of text are devoted to each country and, within this limited space, the author deals with personal and corporate taxation, and with death duties as well as taxes on income. Necessarily, therefore, the book raises many more questions than it answers; but this, perhaps, makes it a stimulating introduction to a much neglected yet increasingly important field of comparative law. The reader may be surprised at the apparent difference in the approach of other countries to some of the fundamental problems of income taxation, such as, for example, the measurement of profits. In the United Kingdom, the role of the qualified accountant is an important one and his computations are accepted (usually) as the basis of negotiation with the Revenue; yet in Italy, so Mr. Nortcliffe tells us, "In the past, the Italian taxation authorities have relied mainly on *inference* for the determination of taxable profits even in the case of reputable companies which maintain regular audited accounts in accordance with the Commercial Code. There are signs of increasing willingness to accept profits as shown by the accounts of companies, and indeed recent legislation requires the authorities to specify the reasons for making adjustments to accounts profits or for refusing to accept accounts profits at all. The traditional approach of the authorities is not, however, likely to be abandoned completely in the near future. . . ." And the French *régime de forfait* seems remarkably arbitrary to an English lawyer. Only in Holland, so it seems, is good accounting and commercial practice readily accepted by the authorities.

Mr. Nortcliffe concludes with a chapter entitled "Has the United Kingdom anything to learn?" and it is clear that in some matters—such as, for example, the depreciation allowances for commercial and administrative buildings—the United Kingdom lags behind the European countries. There is much, too, that could be learned from a close study of the French turnover tax on added values, and the income-splitting principle for family incomes.

Barry Pinson.

A Legal Bibliography of the British Commonwealth of Nations. Second edition. [London: Sweet & Maxwell, Ltd. 1955–1958. 6 vols. £11 18s. net.]

Bibliographies are not often accorded lengthy reviews in legal periodicals. The size, scope and importance of the present work, however, make it desirable to discuss it in some detail, the more so as it has not been reviewed in the pages of the *Modern Law Review* before.

The first volume of the first edition of Sweet & Maxwell's bibliography was published as long ago as 1925; in the intervening years, it has gained for itself an important and assured place as an essential tool in legal and other libraries. The second edition, which by now has all but superseded the first one is made up as follows: Vol. 1. English law to 1800, including Wales, the Channel Islands and the Isle of Man; Vol. 2. English law from 1801 to 1954, including Wales, the Channel Islands and the Isle of Man; Vol. 3. Canadian and British-American colonial law from earliest times to December 1956; Vol. 4. Irish law to 1956; Vol. 5. Scottish law to 1956, together with a list of Roman law books in the English language; Vol. 6. Australia, New Zealand and their dependencies from earliest times to June 1958. The volume dealing with Canada is in its first edition, not having been published before. England which accounted for Vols. 1–3 of the first edition is now covered in two volumes. The scheme of that edition has been retained, but there are numerous corrections, additions and improvements.

The contents of Vol. 1 are arranged in classified order according to subject, and the volume is completed by an index of subjects, an index of places (very

useful for local material), and an author and title index. The other volumes are arranged alphabetically according to author, at least within the same territory. In the case of the British Isles up to 1800, and in the case of all other countries, details of the Session Laws are given volume by volume; in view of the diverse ways in which overseas legislation was often published, this is a most valuable feature.

The amount of bibliographical detail given varies enormously, but is adequate. It is obvious that it is useful to give details of editions, pagination and format, etc., and annotations for very old books; to do the same for contemporary works would mean a needless increase in the size and price of the work to very little purpose, and the compilers have been right in being selective. It is worth comparing the entries for Blackstone's *Commentaries* which run to two pages with those for some modern books taking up one line.

That the work is being constantly used in law libraries, in which it forms part of the basic equipment, is obvious. It is also most useful for academic lawyers and practitioners; to the latter, it will afford guidance as to the law of the overseas territories with which they would tend to be less familiar. It is not being used by lawyers only; historians, for instance, have occasion to consult it, particularly (for England) Vol. 1.

No bibliography can be completely up to date. The present one is being supplemented by various lists, but it would be helpful if cumulative supplements to the entire work could be published annually.

W. A. STEINER.

ACROSS THE ATLANTIC. By LAURENCE WEBLEY. [London: Stevens & Sons, Ltd. 1960. 331 pp. 18s. 6d. net.]

THE MURDER OF SIR HARRY OAKES, BT. [Published by *The Nassau Daily Tribune*, Nassau, Bahamas. 1959. viii and 481 pp. 25s. net.]

MR. WEBLEY'S book is an interesting study. He has taken eight dramatic episodes from British and American history and arranged them in pairs for purposes of comparison. Thus the murder of Abraham Lincoln is matched with that of the little-remembered British Prime Minister, Spencer Perceval, in 1812; the sinking of the *Titanic* with the tragedy of the Lake Michigan ferryboat *Eastland*; the court-martial of Frémont, the pioneer in California, with the near-disgrace of Lord Clive; and the riots of the Chicago Anarchists with the troubles that led to the tragedy of Peterloo. In each case the author provides a clear account of the events, built up from contemporary newspaper and other accounts and legal records. The culmination of each episode is a legal trial or inquiry, in which comparisons between English and United States procedure and rules, and between the law today and the law as at the time of the events related, is neatly pointed. Thus, for example, the law of insanity as a defence to a charge of murder in England, both in 1812 and at the present day, is investigated in the first episode (the assassination of Perceval), while the crime of conspiracy is considered in connection with the activities of the Chicago Anarchists and the Manchester Reformers. A selected bibliography appears at the end of each section for those who wish to read further about the episodes or their surrounding circumstances. Although the author from time to time puts forward his own views as to the merits of various points in the trials, his primary object is to help the reader to make up his own mind about such problems, and in this he succeeds. The book is stimulating and entertaining, food for thought, yet very easy to read. Indeed, it makes excellent leisure-time reading for a lawyer.

The bulky paper-backed dossier dealing with the celebrated murder of Sir Harry Oakes at Nassau in the Bahamas, in July 1943, is a full report of the

case as published over quite a long period in the *Nassau Daily Tribune*. Anyone who wishes to read such a full account by journalists should find the volume of interest. Great trouble was taken by the newspaper to make sure the account was accurate, and most of the reports were written by the editor's brother, now a distinguished advocate at the Bahamas Bar. As a case history of a famous unsolved crime it is a document of considerable fascination, though the style is of course very much that of a daily paper.

D. C. M. Yardley.

Books and Publications Received

The Year Book of World Affairs 1961. Editors: George W. Keeton and Georg Schwarzenberger. 435 pp. Published under the auspices of the London Institute of World Affairs. Stevens & Sons Ltd. £3 3s. net.

The Grotius Society Transactions for the Year 1958 & 1959, Vol. 44. 356 pp. Published under the auspices of the British Institute of International & Comparative Law, 1 Temple Gardens, Temple, London, E.C.4.

Current Legal Problems 1961. Edited by George W. Keeton and Georg Schwarzenberger. 316 pp. Stevens & Sons, Ltd. £3 3s. net.

Gatley on Libel and Slander. First Cumulative Supplement to the fifth edition (To December 31st, 1960). By Richard O'Sullivan and R. L. McEwen. Sweet & Maxwell, Ltd.

Stefan Rozmaryn: Konstytucia Jako ustawa zasadnicza PRL. 326 pp. ARS POLONA. Warszawa, Krakowskie Przedmiescie 7, Poland.

Journal of the International Commission of Jurists. Vol. III, No. 1, Spring 1961. Editor: Jean-Flavien Lalive. 174 pp.

Encyclopedia of the Law of Town and Country Planning. Release No. 6, May 30, 1961. Sweet & Maxwell Ltd.

Censors. The Rede Lecture, 1961. By Lord Radcliffe. 32 pp. Cambridge University Press. 3s. 6d. net.

Dag Hammarskjöld: The International Civil Servant in Law and Fact. 28 pp. Oxford University Press. 1961. 2s. 6d. net.

Intent to Kill. Transcript of papers by Edward Griew and J. E. Hall Williams. Haldane Society. 1961. 2s. 6d.

Pension Scheme Benefits. By William Phillips. First Supplement (To July 1, 1961). Sweet & Maxwell, Ltd. 12s. 6d. Main Book and Supplement, £4 4s.

Indian Traditions and the Rule of Law Among Nations. Report of the All-India Seminar, 1960, held on March 9–11 at the University of Delhi. 28 pp.